

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 448:

UNITED STATES OF AMERICA, APPELLANT

vs.

McKESSON AND ROBBINS, INCORPORATED

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from the United States District Court for the Southern District of New York.....	1	1
Complaint.....	1	1
Answer.....	7	5
Notice of plaintiff's motion for summary judgment.....	15	10
Motion for summary judgment.....	16	11
Affidavit of Laurence C. Ehrhardt in opposition to motion for summary judgment.....	18	11
Exhibit A—Manufacturer-wholesaler fair trade agreement.....	20	13
Exhibit B—Manufacturer-retailer fair trade agreement.....	23	14
Exhibit C—Survey of distribution methods of fair-trading manufacturers.....	26	15
Opinion on motion for summary judgment, Murphy, J....	27	16
Interrogatories propounded by the plaintiff.....	42	25
Exhibit A—Manufacturer-wholesaler fair trade agreement.....	47	28
Exhibit B—Manufacturer-retailer fair trade agreement.....	48	29
Answers of defendant to interrogatories on behalf of the United States.....	51	30
Annex to Item 4—Statement showing dollar volume of sales to retailers by McKesson & Robbins, Inc.....	60	34
Annex to Item 5—Statement showing list of wholesale drug divisions of McKesson & Robbins, Inc., with addresses.....	62	36

Record from the United States District Court for the Southern
District of New York—Continued

Answers of defendant to interrogatories on behalf of the
United States—Continued

Original Print

Annex to Item 7—Statement showing list of whole- salers to whom McKesson & Robbins, Inc., sold products, etc.....	64	37
Annex to Item 8—Statement showing list of whole- salers to whom McKesson & Robbins, Inc., sold products, etc.....	65	37
Annex to Item 9—List of McKesson products.....	66	faces 37
Supplemental interrogatories propounded by the plaintiff.....	67	37
Exhibit 1—Letter dated June 1, 1951, from McKesson & Robbins, Inc., transmitting "Manufacturer- retailer fair trade agreement".....	74	43
Exhibit 2—Letter dated June 1, 1951, from McKesson & Robbins, Inc., transmitting "Manufacturer- wholesaler fair trade agreement".....	76	44
Exhibit 3—Memorandum dated June 1, 1951, "For attention of Chief House Executives" and signed "H. C. Nolen".....	80	46
Exhibit 4—Memorandum dated June 8, 1951, "For attention of Chief House Executives" and signed "H. C. Nolen".....	84	49
Exhibit 5—Memorandum dated June 6, 1951, "For attention of Chief House Executives" and signed "H. C. Nolen".....	85	50
Exhibit 6—Letter dated June 8, 1951, from McKesson & Robbins, Inc., transmitting "Manufacturer- wholesaler fair trade agreement".....	86	50
Exhibit 7—Letter dated June 8, 1951, from McKesson & Robbins, Inc., to wholesaler customers.....	89	52
Answers to supplemental interrogatories propounded by plaintiff.....	92	53
Annex to Item 17—Statement showing list of whole- salers who executed form of fair trade agreement.....	114	58
Annex to Item 19—Statement showing list of cus- tomers to whom direct retail sales were made, etc.....	120	60
Admission of facts.....	121	61
Stipulation of facts.....	122	61
Stipulation of facts.....	125	64
Deposition of Wilbur E. Dewell:		
Direct.....	127	64
Cross.....	249	121
Redirect.....	249	121
Deposition of Herman C. Nolen.....	258	125
Stenographer's minutes of May 18, 1955.....	340	163
Appearances.....	340	163
Offers in evidence.....	341	163
Plaintiff rests.....	354	169

Record from the United States District Court for the Southern
District of New York—Continued

Stenographer's minutes of May 18, 1955—Continued

	Original	Print
Motion to dismiss and ruling thereon.....	354	169
Argument of Mr. Dobey.....	355	169
Argument of Mr. McGrath.....	367	175
Opinion, Clancy, J.....	380	180
Findings of fact.....	381	180
Conclusion of law.....	383	181
Notice of motion to make additional findings.....	387	183
Motion to make additional findings.....	388	184
Memo of denial of motion.....	394A	188
Affidavit of Denis B. Sullivan in opposition to motion for making additional findings.....	395	189
Hearing on motion to make additional findings.....	399A	192
Government's Exhibit 8—List of defendant's published net wholesale prices in effect May 27, 1952.....	401 faces	199
Government's Exhibit 9—Price and discount schedule.....	403 faces	199
Government's Exhibit 10—Price list on sales of McKesson products by the Manufacturing Division to wholesalers and retailers.....	404	200
Government's Exhibit 11—Summary of sales by the Manu- facturing Division of McKesson & Robbins, Inc., to retail accounts during the period July 1, 1951, to June 30, 1952.....	405	201
Government's Exhibit 12—Letter dated March 10, 1955, from Peoples Drug Stores to Department of Justice.....	407	202
Government's Exhibit 13—List of locations of Peoples Drug Stores.....	408	203
Government's Exhibit 14—Letter dated April 17, 1953, from McKesson & Robbins, Inc., to Northern Drug Co., with form of Manufacturers-Wholesaler fair trade agree- ment (Latter omitted in printing).....	409	205
Government's Exhibit 15—Fair Trade Form W/4/53— "Manufacturers-Wholesaler Fair Trade Agreement".....	412	206
Government's Exhibit 16—Fair Trade Form R/4/53— "Manufacturers-Retailer Fair Trade Agreement".....	414	208
Government's Exhibit 17—Letter dated March 21, 1955, from McKesson & Robbins, Inc., with attached price list (price list omitted in printing).....	416	209
Government's Exhibit 18—Summary of sales of McKesson products by the wholesale divisions of McKesson & Robbins to other wholesalers during the period July 1, 1951, and ending June 30, 1952.....	425	209
Government's Exhibit 20—Letter dated April 18, 1955, from Walgreen Drug Stores to Department of Justice with accompanying list showing locations of its stores.....	428	210
Government's Exhibit 21—Letter dated April 7, 1955, from Katz Drug Co. to Department of Justice with accompanying list showing locations of its stores.....	445	222

Record from the United States District Court for the Southern
District of New York.—Continued

Original Print

Government's Exhibit 22—Letter dated April 21, 1955, from United Cigar-Whelan Stores Corporation to Department of Justice with accompanying list showing locations of its stores.....	447	223
Government's Exhibit 23—Letter dated April 4, 1955, from the Marshal Drug Company to Department of Justice with accompanying list showing locations of its stores.....	450	228
Government's Exhibit 24—Letter dated April 4, 1955, from Sun Drug Company, Inc., to Department of Justice with accompanying list showing locations of its stores.....	452	231
Government's Exhibit 25—Letter dated April 6, 1955, from Crown Drug Company to Department of Justice with accompanying list showing locations of its stores.....	454	232
Government's Exhibit 26—Letter dated March 21, 1955, from Sun Ray Drug Co., to Department of Justice with accompanying list showing locations of its stores.....	457	234
Government's Exhibit 27—Letter dated April 5, 1955, from Cohen Drug Company to Department of Justice with list showing locations of its stores.....	461	238
Government's Exhibit 28—Letter dated April "81", 1955, from Gray Drug Stores, Inc., to Department of Justice with accompanying list showing locations of its stores.....	462	239
Government's Exhibit 29—Letter dated April 29, 1955, from Cunningham Drug Stores, Inc., to Department of Justice with accompanying list showing locations of its stores.....	468	243
Government's Exhibit 30—Letter dated April 27, 1955, from Rexall Drug Company to Department of Justice with accompanying list showing locations of its stores.....	471	246
Notice of appeal to the Supreme Court of the United States.....	477	250
Clerk's certificate (omitted in printing).....	480	251
Order noting probable jurisdiction.....	481	251

United States District Court, Southern District of
New York

Civil Action No. 7650

UNITED STATES OF AMERICA, PLAINTIFF

v.

MCKESSON & ROBBINS, INCORPORATED, DEFENDANT

Complaint

Filed May 27, 1952

[File endorsement omitted.]

The United States of America, plaintiff, by its attorneys acting under the direction of the Acting Attorney General of the United States, brings this action and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendant under Section 4 of the Act of Congress of July 2, 1890, 26 Stat. 209, (15 U. S. C. Sec. 4) as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendant, as hereinafter alleged, of Section 1 of the Sherman Act.

2. The defendant named herein maintains offices, transacts business and is found within the Southern District of New York.

II. THE DEFENDANT

3. McKesson & Robbins, Incorporated, is hereby made defendant herein. It is a corporation organized and existing under the laws of the State of Maryland and has its general offices at 155 East 44 Street, New York 17, New York.

III. NATURE OF THE TRADE AND COMMERCE

4. The defendant is one of the largest wholesalers of drugstore merchandise in the United States. Operating through more than 70 divisions located in 35 states, it conducts a nationwide business, dealing at wholesale in drugs, pharmaceuticals, surgical and medical supplies, toilet articles, and sundry other items customarily sold in drugstores.

5. Most of the merchandise wholesaled by the defendant consists of products manufactured or supplied to it by other concerns.

The remainder, accounting for annual net sales of about \$11,000,000, consists of products manufactured or packaged by the defendant at its plant in the State of Connecticut and branded with the defendant's name. The branded products manufactured or packaged by the defendant are sometimes hereinafter called "McKesson products." McKesson products constitute a line of drugs, pharmaceuticals, cosmetics and toilet preparations.

6. The defendant sells most of its merchandise, including McKesson products, to drugstores and other retailers who are located throughout the United States, who in turn resell said merchandise to ultimate consumers. The defendant also sells McKesson products to numerous other wholesalers of drugstore merchandise throughout the United States, who are competitors of the defendant in the business of wholesaling drugstore merchandise. Said other wholesalers resell said McKesson products, in competition with the defendant, to drugstores and other retailers throughout the United States. In the year ending June 30, 1951, the defendant's net sales of McKesson products to said other wholesalers of drugstore merchandise amounted to more than \$700,000.

7. There is a continuous flow of McKesson products in interstate trade and commerce from the defendant to retailers, from the defendant to other wholesalers of drugstore merchandise, from other wholesalers of drugstore merchandise to retailers, and from retailers to ultimate consumers.

3

IV. THE CO-CONSPIRATORS

8. Numerous wholesalers of drugstore merchandise, not made defendants herein, participated as co-conspirators with the defendant in the offense hereinafter charged, and performed acts and made statements in furtherance of said offense. These co-conspirators are those wholesalers of drugstore merchandise to whom the defendant sells McKesson products, as recited in Paragraph 6 above. All of said co-conspirators have entered into written resale price maintenance contracts with the defendant pertaining to McKesson products.

V. OFFENSE CHARGED

9. Beginning in or about June 1951, and continuing up to and including the date of the filing of this complaint, the defendant and co-conspirators have engaged in an unlawful combination and conspiracy and have entered into unlawful contracts, agreements and understandings to fix and control wholesale and retail selling prices of McKesson products, in restraint of the aforesaid interstate trade and commerce therein, in violation of Section 1 of the Sherman Act. The defendant and co-conspirators threaten to

and will continue the offense unless the relief hereinafter prayed for in this complaint is granted.

10. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant and the co-conspirators, the substantial terms of which have been that they agree that:

(a) the defendant fix and establish minimum wholesale and retail prices for the sale and resale of McKesson products, and inform the co-conspirators of such prices;

(b) the defendant and the co-conspirators will not offer for sale, sell, or resell McKesson products to drugstores or other retailers at prices less than the said minimum wholesale prices fixed by the defendant;

(c) the defendant and the co-conspirators require each drugstore or other retailer to whom they sell McKesson products to agree that it will not resell McKesson products at prices less than the said minimum retail prices fixed by the defendant;

(d) the defendant will not offer for sale or sell McKesson products to any wholesaler who fails or refuses to agree not to sell McKesson products at prices less than the said minimum wholesale prices fixed by the defendant, or who fails or refuses to agree to require its purchasers to agree to maintain the minimum retail prices fixed by the defendant.

(e) the defendant and co-conspirators induce, cause and compel retailers to maintain the minimum retail prices fixed by defendant.

11. For the purpose of effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators, by agreement and concert of action, have done those things which as hereinbefore alleged they combined and conspired to do.

VI. EFFECTS OF THE CONSPIRACY

12. The aforesaid combination and conspiracy has had the following effects:

(a) wholesale and retail prices of McKesson products have been fixed by private agreement instead of by free competition;

(b) wholesalers desiring to sell McKesson products at prices less than those fixed by the conspiracy have been unable to buy such products from the defendant;

(c) retailers have been caused to sell McKesson products at prices not less than those fixed by private agreement, instead of prices determined by free competition;

(d) consumers of McKesson products have been barred by the conspiracy from buying such products at lower prices.

PRAYER

5 Wherefore, Plaintiff prays:

1. That the aforesaid combination and conspiracy in restraint of interstate trade and commerce in McKesson products be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act.

2. That the defendant, its officers, directors, agents and employees and all persons acting or claiming to act on behalf of the defendant be perpetually enjoined and restrained from continuing to carry out directly or indirectly the aforesaid combination and conspiracy to control wholesale and retail selling prices of McKesson products, as hereinbefore alleged, or any combination or conspiracy having a like purpose or effect.

3. That the Court order the cancellation of all resale price maintenance contracts, agreements and understandings entered into between the defendant and the co-conspirators.

4. That the defendant be enjoined from entering into any combination, conspiracy, contract, agreement, or understanding, express or implied, with any wholesaler of drugstore merchandise whereby it is agreed or understood that the wholesaler will maintain or adhere to prices or minimum prices fixed by defendant, or agreed upon between defendant and said wholesaler, for sales to retailers or other purchasers, or whereby it is agreed or understood that the said wholesaler will sell McKesson products only to retailers who agree to maintain fixed or minimum resale prices.

5. That the defendant be enjoined from inducing, persuading, or causing any wholesaler to maintain minimum wholesale prices fixed or suggested by defendant, or to require retailers to whom said wholesaler resells McKesson products to enter into agreements or understandings with the defendant or with such wholesaler fixing minimum retail prices for the sale of McKesson products.

6. That the defendant be enjoined from refusing to sell McKesson products to any wholesaler because said wholesaler has not agreed to maintain, or has failed to maintain minimum wholesale prices fixed or suggested by defendant, or because said wholesaler has not required or attempted to require retailers to whom it resells said products to enter into agreements or understandings with it, or with the defendant, fixing minimum resale prices.

7. That the defendant be enjoined, for such time as is necessary to dissipate the effects of the aforesaid combination and conspiracy, from inducing, persuading or causing any retailer to observe fixed minimum prices of McKesson products.

8. That the defendant be enjoined, for such time as is necessary to dissipate the effects of the aforesaid combination and con-

spiracy, from refusing to sell McKesson products to any retailer by reason of any price policy followed by such retailer.

9. That the plaintiff have such other, further and general relief as may be necessary in the premises.

10. That the plaintiff recover the costs of this suit.

Dated May 27, 1952.

Melville C. Williams;

MELVILLE C. WILLIAMS,

Special Assistant to the Attorney General.

C. Worth Rowley,

C. WORTH ROWLEY,

Harold Lasser, HBA,

HAROLD LASSER,

Trial Attorneys.

Philip B. Perlman,

PHILIP B. PERLMAN,

Acting Attorney General.

H. G. Morison,

H. G. MORISON,

Assistant Attorney General.

Geo. B. Haddock,

GEORGE B. HADDOCK,

Special Assistant to the Attorney General.

Myles J. Lane,

MYLES J. LANE,

United States Attorney.

7 United States District Court, Southern District
of New York

Answer

Filed September 26, 1952

[File endorsement omitted]

[Title omitted]

The defendant McKesson & Robbins, Incorporated, for its answer to the complaint herein:

1. As to the allegations of paragraph 1, denies that it has or is now violating Section 1 of the Sherman Act (15 U. S. C. § 1) as charged in the complaint, and therefore denies that this action has been properly commenced under Section 4 of that Act (15 U. S. C. § 4).

2. Admits the allegations of paragraph 2.

3. Admits the allegations of paragraph 3, except that it denies that it has properly been made a defendant herein.

4. Admits the allegations of paragraphs 4 and 5 with the explanation that the conduct of its business as a wholesaler of drug store merchandise is separate and distinct from and on an entirely different functional level than the conduct of its business as a manufacturer of drugs and drug products.

5. Denies each and every allegation of paragraph 6, except that it admits that in the conduct of its wholesale drug business the defendant sells drug store merchandise, including "McKesson products," principally to drug stores and other retailers

8 located throughout the United States, for resale to ultimate consumers, and that in the conduct of that business the wholesale drug divisions operated by it compete with other wholesalers. The defendant also admits that in the conduct of its business as a drug manufacturer it sells "McKesson products" through wholesalers, including its own wholesale divisions, for resale to drug stores and other retailers throughout the United States, none of which wholesalers to its knowledge and belief competes with it in the drug manufacturing business. The defendant denies, however, that the volume of "McKesson products" sold to such other wholesalers is significant in relation to the total volume of products manufactured and sold by it, and denies the existence of substantial competition with other wholesalers with respect to "McKesson products."

6. Denies each and every allegation of paragraph 7, except that it admits that in the conduct of its business as a drug manufacturer the defendant sells and ships "McKesson products" in interstate trade and commerce to wholesalers and retailers of drug store merchandise.

7. Denies each and every allegation of paragraph 8, except that it admits that in the conduct of its business as a drug manufacturer the defendant sells and distributes "McKesson products" under legal fair trade resale price maintenance contracts between it and various of its wholesaler and retailer customers.

8. Denies each and every allegation of paragraphs 9, 10, 11, and 12.

Further answering the complaint, and as a first defense thereto, the defendant alleges:

9. The complaint fails to state a claim upon which relief can be granted.

9 Further answering the complaint, and as a second defense thereto, the defendant alleges:

10. The defendant is engaged principally in the conduct of three separate and distinct businesses: (a) the manufacture of drugs and drug products, (b) the wholesaling of drug store merchandise, and (c) the distribution at wholesale of alcoholic beverages. The functions, purposes and objectives of each are

different and, except only in so far as it is necessary to formulate overall policies for each, and generally to supervise and control their activities, the operations of each are conducted separately and independently of the others by different staffs of officers and employees in different and to a considerable extent entirely separate establishments.

11. In the conduct of its business as a drug manufacturer the defendant manufactures "McKesson products" under trademarks or brand names owned by it at its manufacturing plant located in Fairfield, Connecticut. Such products are sold and delivered from there, in free and open competition with similar brand names or trademarked products manufactured by others, to wholesale and retail drug concerns, including the various wholesale drug divisions owned and operated by the defendant. Upon information and belief, none of the wholesalers to whom the defendant thus sells its brand name or trademarked products are engaged in the business of manufacturing competitive drug products.

12. The fair trade resale price maintenance contracts under which the defendant in its capacity as a drug manufacturer sells "McKesson products" to wholesalers and retailers are not
10 between persons, firms or corporations in competition with each other at the same functional level but are vertical contracts between a manufacturer and its wholesalers, or between a manufacturer and its retailers, and are legal and proper in all respects and in accordance with the letter and spirit of the various State fair trade acts, of the Miller-Tydings Amendment to the Sherman Act (50 Stat. 693), and of the Act of July 14, 1952, Public Law 542, 82d Cong. (hereinafter called the Federal Fair Trade Act).

Further answering the complaint and as a third defense thereto, the defendant alleges:

13. The brand name or trademarked products manufactured by the defendant are sold and distributed in free and open competition with similar brand name or trademarked products manufactured, sold and distributed by other manufacturers.

14. Upon information and belief, most of such other manufacturers sell their brand name and trademarked products to various of the wholesale drug divisions operated by the defendant, to other wholesalers and to retailers. In competition with such other manufacturers, the defendant also sells its brand name and trademarked products to the various wholesale drug divisions operated by it, to other wholesalers and to retailers.

15. With respect to the relatively small volume of McKesson brand name or trademarked products distributed through wholesalers other than the wholesale divisions operated by the defendant, and in competition with any of such wholesale divisions,

it is competition that was created by and is fostered and promoted by the defendant and in all essential respects is similar to and no different from the competition from other wholesalers enjoyed by the various wholesale drug divisions of the defendant in the sale and distribution of brand name and trademarked products as well as other types of drugstore merchandise manufactured by others.

16. The brand names and trademarks under which the defendant manufactures, sells and distributes its products, like the brand names and trademarks under which competitive products are manufactured, sold and distributed by other manufacturers, are assets of substantial value. To afford the defendant and such other manufacturers with the means for protecting the value of such brand names and trademarks, fair trade statutes have been enacted and are now in force and effect in 45 states of the United States, and the Miller-Tydings Amendment to the Sherman Act and the Federal Fair Trade Act have been enacted and are now in force and effect in the United States.

17. These statutes authorize and permit manufacturers of brand name or trademarked products sold in free and open competition with products of the same general class manufactured by others to sell their products under fair trade resale price maintenance contracts. In accordance with the provisions of those statutes, the defendant and upon information and belief, many of the other manufacturers of competitive products, have entered into such resale price maintenance contracts with wholesalers and retailers.

18. The fair trade resale price maintenance contracts thus entered into between the defendant and various of the wholesalers and retailers of its brand name and trademarked products are intended to accomplish the same results for the defendant as the fair trade resale price maintenance contracts entered into by other manufacturers of competitive products with their wholesalers and retailers are intended to accomplish for such manufacturers, and are necessary and proper to enable the defendant successfully to compete with such other manufacturers.

19. Any interpretation of the provisions of the Miller-Tydings Amendment to the Sherman Act or of the Federal Fair Trade Act which would exclude the resale price maintenance contracts of the defendant from the protection of those acts simply because in addition to being a manufacturer of brand name and trademarked products the defendant is also a wholesaler of drugstore merchandise, would be strained and unreal, would not be consistent with the purposes and intent of those laws, would deny to the defendant the equal protection of the laws, and would deprive the defendant of its property without due process of law.

in violation of the property rights guaranteed to it by the Constitution of the United States.

Further answering the complaint and as a fourth defense thereto, the defendant alleges:

20. Prior to the decision of the Supreme Court of the United States in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, decided on May 21, 1951, the defendant, like other manufacturers of competitive products, obtained adequate legal protection of its goodwill and the value of its brand names and trademarks by means of resale price maintenance contracts entered into at the retail level with a single retailer in each of the 45 states having fair trade laws permitting such contracts.

21. The decision in the *Schwegmann* case deprived the defendant of this method of protecting its goodwill and the value of its brand names and trademarks and it was compelled to look for other and different means of obtaining that protection. The only other feasible method was through the execution of resale price maintenance contracts at the wholesale level with wholesalers containing appropriate provisions authorized under state fair trade laws and not in issue in the *Schwegmann* case, requiring such wholesalers in reselling McKesson brand name and trademarked products to obtain contracts from retailers whereby the latter agreed to maintain and adhere to resale prices at the retail level. The wholesaler contracts containing those provisions are the contracts under attack in this action.

22. Since the commencement of this action, however, the Federal Fair Trade Act has become law. This Act, enacted principally for the purpose of remedying the situation created by the *Schwegmann* decision, has restored to the defendant the right to protect its goodwill and the value of its brand names and trademarks at the retail level by means of resale price maintenance contracts with a single retailer in each of the various states in which such contracts are permitted by law without the agreement, aid, assistance or cooperation of any of its wholesale customers.

23. In addition, the Federal Fair Trade Act expressly recognizes and confirms the legality under the antitrust laws of contractual provisions in any resale price maintenance contract "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices."

24. As a result this action is now academic and has become moot in so far as it challenges the validity of the fair trade resale price maintenance contracts between the defendant and any of its wholesale customers because of any provision contained therein requiring such wholesale customers to resell McKesson brand name and trademarked products only to

retailers who in turn agree to maintain and adhere to resale prices at the retail level.

25. Also, as a result of the enactment of the Federal Fair Trade Act and its various provisions the matters complained of do not involve any injury to the public and this action is not properly brought under the antitrust laws and should be dismissed.

Wherefore, the defendant respectfully demands judgment that this action be dismissed.

HODGES, REAVIS, McGRATH,
PANTALEONI & DOWNEY,

By ROBERT TREUM,

*a member of the firm, Attorneys for Defendant, Office
and P. O. Address: 20 Pine Street, New York 5, N. Y.*

15 In the United States District Court for the Southern
District of New York

Notice of Plaintiff's Motion for Summary Judgment

Filed March 18, 1954

[File endorsement omitted.]

[Title omitted.]

Please take notice that the undersigned will move the Court in accordance with the attached Motion for Summary Judgment on the 27th day of April 1954, at Room 506, United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York at 10:00 a. m. or as soon thereafter as counsel can be heard, for an order granting said motion and for such other and further relief as may be just and proper.

Dated: New York, New York.

March 15, 1954.

Yours, etc.

RICHARD B. O'DONNELL,
*Special Assistant to the Attorney General, Room 235,
U. S. Court House, Foley Square, New York, N. Y.*

ALLEN A. DOBEY,

WILLIAM F. ROGERS,

Trial Attorneys.

WORTH ROWLEY,

Special Assistant to the Attorney General.

To Hodges, Reavis, McGrath, Pantaleoni & Downey, 20 Pine Street, New York 5, New York, attorneys for McKesson & Robbins, Incorporated.

Service acknowledged and copy received this 15th day of March 1954.

Hodges, Reavis, McGrath,
Pantaleoni & Downey,
HODGES, REAVIS, MCGRATH,
PANTALEONI & DOWNEY,
by DENIS B. SULLIVAN,
*Attorneys for Defendant,
McKesson & Robbins Incorporated.*

16 In the United State District Court for the Southern
District of New York

Plaintiff's motion for summary judgment

Filed March 18, 1954

[Title omitted.]

The United States of America; plaintiff, by its attorneys, pursuant to Rule 56 of the Rules of Civil Procedure, hereby moves the Court for summary judgment in favor of the United States on the ground that the Admissions of the defendant on file in this action show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

Dated March 15, 1954.

ALLEN A. DOBEY,
WILLIAM F. ROGERS,
Trial Attorneys.

WORTH ROWLEY,
Special Assistant to the Attorney General.

RICHARD B. O'DONNELL,
Special Assistant to the Attorney General.

18 In the United States District Court for the
Southern District of New York

*Affidavit of Laurence C. Ehrhardt in opposition to motion for
summary judgment*

Filed July 2, 1954

STATE OF NEW YORK,
County of New York, ss:

[File endorsement omitted.]

[Title omitted.]

Laurence C. Ehrhardt, being duly sworn, deposes and says:

I am Vice President in charge of the Legal Department of McKesson & Robbins, Incorporated. I submit this affidavit in opposition to the Government's motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor in the above-entitled action.

In the Government's memorandum in support of this motion the contention is made that the fair trade contracts of McKesson & Robbins Laboratories, the manufacturing division of the defendant, contained a provision reading as follows:

"Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchasers will not, in turn, resell them at less than the prescribed net retail minimum prices published by Seller."

This is not the fact. Such a provision did appear in the old forms of fair trade contracts but it has been deleted from the new forms, copies of which are annexed hereto as Exhibits A and B.

19 These new forms of fair trade contracts replaced the old forms after the enactment of the McGuire Act and are now being used in every state where fair trading is permitted, and where this defendant fair trades its products, except in the State of Michigan. No new contracts have been obtained in that state because of the uncertainty of the law with respect to the validity of its fair trade statute.

As evidence of the fact that many manufacturers of fair traded products also operate their own wholesale or retail outlets in competition with independently operated wholesalers or retailers with whom they have fair trade contracts, there is attached hereto as Exhibit C a copy of an excerpt taken from the February 1, 1954 "Newsletter" published by the American Fair Trade Council, Inc., 11 East 44th Street, New York 17, N. Y.

As shown therein, it is the practice of most fair trading manufacturers to operate distribution outlets at one or more levels in the distribution process which sell in competition with similar independently owned outlets who also distribute the manufacturers' fair traded products.

LAURENCE C. EHRHARDT.

Sworn to before me this 22d day of April 1954.

[SEAL]

Imelda Colton,

IMELDA COLTON,

Notary Public, State of New York.

No. 03-0716115. Qualified in Bronx County. Certs. filed with Bronx and New York County Clerks and Registers. Commission expires March 30, 1955.

20

**EXHIBIT A TO AFFIDAVIT—MANUFACTURER—
WHOLESALE FAIR TRADE AGREEMENT**

Between the undersigned Manufacturer, McKesson & Robbins Laboratories Division of McKesson & Robbins, Incorporated, a Maryland Corporation, and the undersigned Wholesaler.

Whereas, Manufacturer's products now or hereafter made subject to this agreement are and will be distributed under Manufacturer's trademark, brand or name in free, fair and open competition with commodities of the same general class produced by others, and Wholesaler is engaged in the sale of such products, and the parties desire to avail themselves of the fair trade acts now and hereafter in effect.

Now, therefore, in consideration of the mutual obligations herein assumed, the parties agree as follows:

1. Wholesaler will not (except as specifically permitted by statute) advertise, offer for sale or sell any products bearing or distributed under the trademark, brand or name of Manufacturer at less than Manufacturer's published minimum wholesale prices, plus in each sale the amount of all applicable sales and excise taxes.

2. Manufacturer reserves the right to change said published minimum wholesale prices and to add or eliminate products from Manufacturer's list of fair-traded products upon giving reasonable notice thereof, either by publication or such other means as Manufacturer may determine.

3. Except as authorized by Manufacturer, (a) the offering or giving of any thing of value by Wholesaler in connection with the sale of any of the products covered by this contract, or (b) the offering or making of any concession in connection with any such sale, or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Wholesaler of this agreement.

4. Manufacturer will employ all appropriate legal means which in the circumstances shall be reasonable, to obtain and enforce observance of the minimum wholesale selling prices established by Manufacturer pursuant to this agreement.

5. This agreement may be terminated by either party on ten (10) day's written notice to the other, but such termination shall not affect the obligations of Manufacturer or Wholesaler arising from any other agreement made by Manufacturer pursuant to an applicable fair trade act.

6. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this agreement shall be lawful as applied to intrastate transactions under a statute law or public policy now or here-

21

after in effect in the state in which such sale is to be made or to which the products are to be transported for sale.

In witness whereof the parties hereto have executed this agreement as of this _____ day of _____ 195_____

MCKESSON & ROBBINS LABORATORIES,
Division of McKesson & Robbins, Incorporated,
Fairfield, Connecticut.

By _____, *Vice President.*

 Wholesaler

 Street

 City and State

By _____

 Title

23 EXHIBIT B TO AFFIDAVIT—MANUFACTURER-RETAILER FAIR TRADE AGREEMENT

Between the undersigned Manufacturer, McKesson & Robbins Laboratories Division of McKesson & Robbins, Incorporated, a Maryland Corporation, and the undersigned Retailer.

Whereas, Manufacturer's products now or hereafter made subject to this agreement are and will be distributed under Manufacturer's trademark, brand or name in free, fair and open competition with commodities of the same general class produced by others, and Retailer is engaged in the sale of such products, and the parties desire to avail themselves of the fair trade acts now and hereafter in effect,

Now, therefore, in consideration of the mutual obligations herein assumed, the parties agree as follows:

1. Retailer will not (except as specifically permitted by statute) advertise, offer for sale or sell any products bearing or distributed under the trademark, brand or name of Manufacturer at less than Manufacturer's published minimum retail prices, plus in each sale the amount of all applicable sales and excise taxes.

2. Manufacturer reserves the right to change said published minimum retail prices and to add or eliminate products from Manufacturer's list of fair traded products upon giving reasonable notice thereof, either by publication or such other means as Manufacturer may determine.

3. Except as authorized by Manufacturer, (a) the offering or giving of any thing of value by Retailer in connection with the sale of any of the products covered by this contract, or (b) the offering or making of any concession in connection with any such sale, or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Retailer of this agreement.

4. Manufacturer will employ all appropriate legal means which in the circumstances shall be reasonable, to obtain and enforce observance of the minimum retail selling prices established by Manufacturer pursuant to this agreement.

5. This agreement may be terminated by either party on ten (10) days' written notice to the other but such termination shall not affect the obligations of Manufacturer or Retailer arising from any other agreement made by Manufacturer pursuant to an applicable fair trade act.

6. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this agreement shall be lawful as applied to intrastate transactions under a statute, law or public policy now or hereafter in effect in the state in which such sale is to be made or to which the products are to be transported for sale.

In witness whereof the parties hereto have executed this agreement as of this ____ day of _____ 195_____.

McKESSON & ROBBINS LABORATORIES,
Division of McKesson & Robbins Incorporated,
Fairfield, Connecticut.

By _____, Vice President.

Retailer

Street

City and State

By _____

Title

26 EXHIBIT C TO AFFIDAVIT—SURVEY OF DISTRIBUTION METHODS OF FAIR-TRADING MANUFACTURERS

The legality of Fair Trade contracts of manufacturers engaged in more than one level of distribution is attacked by the Government in current suits filed against Doubleday & Co., Inc., Eastman Kodak Co., and McKesson Robbins, Inc.

AFTC conducted a survey of known Fair-Trading manufacturers to determine to what extent such manufacturers are engaged in more than one level of distribution.

All answers were mailed directly by the manufacturers to Ernst & Ernst, nationally known certified public accountants, who tabulated and certified the results.

A total of 86% of all manufacturers who responded disclosed that they sell Fair-Traded products to wholesalers.

Of this 86% who sell Fair-Traded products to wholesalers, 82% also sell Fair-Traded products to retailers . . . 34% also sell Fair-Traded products to consumers . . . 10% also have wholly owned or controlled subsidiaries that sell Fair-Traded products

to wholesalers . . . 9% also have wholly owned or controlled subsidiaries that sell Fair-Traded products to retailers . . . 4% also have wholly owned or controlled subsidiaries that sell Fair-Traded products to consumers.

27 United States District Court, Southern District
of New York

Civ. 76-50

UNITED STATES OF AMERICA, PLAINTIFF
against

MCKESSON & ROBBINS, INCORPORATED, DEFENDANT

Open on motion for summary judgment

July 1, 1954

Appearances: Worth Rowley, Esq., Special Assistant to the Attorney General, Attorney for Plaintiff, (Allen A. Dobey, William F. Rogers, of Counsel). Hodges, Reavis, McGrath, Pantaleoni & Downey, Attorneys for Defendant (John P. McGrath, Denis B. Sullivan, Robert Thrun, Laurence C. Ehrhardt, of Counsel).

MURPHY, D. J.

On this motion for summary judgment by plaintiff under Rule 56, Fed. Rules Civ. Proced., 28 U. S. C. A., in an action under Section 4 of the Sherman Act¹ seeking adjudication of illegality and injunction, a question of first impression in the courts is presented: Is a manufacturer, who is also a wholesaler and a limited retailer of his own products, as well as a wholesaler of products of other manufacturers, privileged to fix resale prices on his own products with competing wholesalers under federal fair trade statutes? Both the Miller-Tydings² and the McGuire³ acts make lawful "contracts or agreements prescribing minimum [* * *]

prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity, and which is in free and open competition with commodities of the same general class produced or distributed by others, * * *." Both acts make this exception to the privilege in these terms:

"[Nothing quoted above shall] make lawful [any] contracts or agreements providing for the establishment or maintenance of minimum * * * resale prices on any commodity * * * between manufacturers, or between producers, or between wholesalers, or

between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

On this motion it is plaintiff's contention that the "contracts or agreements providing for the establishment or maintenance of minimum * * * resale prices on any commodity," concededly made by defendant through its wholesale drug divisions with competing wholesalers, are ones "between wholesalers * * * or between persons, firms, or corporations in competition with each other." Consequently, not privileged under either fair trade act, they are illegal *per se* as price fixing agreements under the Sherman Act.

Defendant takes the position that the fair trade acts privilege vertical price fixing at different levels, between a manufacturer as seller and wholesalers as buyers, or at least between a manufacturer-wholesaler as seller and other wholesalers as buyers. The explicit exception to this privilege continues the Sherman Act prohibitions against horizontal price fixing by competitors at the same functional level. If this construction of the fair trade acts is not a valid one, defendant alternatively contends that genuine issues of material facts remain for resolution before plaintiff may prevail.

The facts, contested and conceded both in the pleadings and in the admissions of facts and answers to interrogatories by defendant, must be considered in order to determine whether or not the principal question posed may be summarily resolved without trial, and if so how.

Defendant is a corporation organized and existing under the laws of the State of Maryland and has its general offices in this judicial district where it transacts business. Defendant is one of the largest wholesalers of drug store merchandise in the United States. It conducts a nation-wide wholesale drug business, operating 74 wholesale drug divisions located in 35 states. Most of its wholesaled drug store merchandise consists of products manufactured, or supplied to it, by other concerns. In addition, at its plant at Bridgeport, Connecticut, the defendant itself manufactures a line of drugs, pharmaceutical, cosmetics and toilet preparations, or "McKesson products." This case relates solely to restraints on the sale, resale, and distribution of the "McKesson" products manufactured by defendant.

In the conduct of its wholesale drug business the defendant sells drug store merchandise, including McKesson products, to drug stores and other retailers located throughout the United States, for resale to ultimate consumers, and in the conduct of its wholesale drug business the defendant's wholesale drug divi-

sions compete with other wholesalers. The defendant also sells McKesson products through wholesalers other than its own wholesale divisions for resale to drug stores and other retailers.

Neither the defendant's manufacturing division located at Bridgeport, Connecticut, nor its 74 wholesale drug divisions located in 35 states, are separately incorporated.

Based on admissions and answers of the defendant its sales of McKesson products to other wholesalers fall into four categories:

(1) sales of McKesson products by the manufacturing division of the defendant to wholesalers whose trading areas are substantially the same as those of wholesale drug divisions of the defendant of whose trading areas, if not the same as those of wholesale drug divisions of the defendant, materially overlap the trading areas of the defendant's wholesale divisions; (2) sales of McKesson products by the manufacturing division of the defendant to other wholesalers whose trading territories do not substantially overlap the trading territories of the wholesale drug divisions of the defendant but in whose trading territories the manufacturing division of the defendant sells McKesson products direct to retailers; (3) sales of McKesson products by the wholesale drug divisions of the defendant to other wholesalers located in the same city or the same trading territory as a wholesale drug division of the defendant; (4) sales of McKesson products by the manufacturing division of the defendant and by the wholesale drug divisions of the defendant to a few wholesalers with respect to whom the present state of the record is inadequate to establish that the wholesaler competes with either the manufacturing division of the defendant or a wholesale drug division of the defendant.

With respect to category #1, although defendant's answer to the complaint denied "existence of substantial competition with other wholesalers with respect to McKesson products", subsequent answers to interrogatories disclosed sales of such products during the fiscal year 1951-52 by defendant's manufacturing division to such wholesalers amounting to \$283,462. In an admission of facts, it is stated that "wholesale drug divisions of the defendant compete in the sale of McKesson products and other drug products with [such] wholesalers * * * in those places where the trading areas of such wholesalers overlap the trading areas of these wholesale drug divisions: New York, N. Y., Brooklyn, N. Y., Cairo, Illinois, Pittsburgh, Pa., Detroit, Mich., Huntington, W. Va., Akron, Ohio."

Under category #2, i. e., sales by defendant's manufacturing division to wholesalers in areas which do not overlap those traded in by defendant's wholesale division but in which sales are made by defendant's manufacturing division direct to retailers, defendant's answers to interrogatories indicate some sales under such

conditions direct to retailers who were parties to defendant's manufacturer-wholesaler fair trade agreement.

In category #3 covering sales of McKesson products by defendant's wholesale division to wholesalers, defendant's answers to interrogatories indicate that its wholesale drug divisions were requested by a vice president of the defendant in charge of drug merchandising, to forward to the manufacturing division a list of the wholesalers to whom they sold McKesson products, and the wholesale drug divisions were instructed not to sell McKesson products to any other wholesaler until they had word from the defendant's manufacturing division that such wholesaler had signed a fair trade contract on those products. The defendant's wholesale drug divisions complied with these instructions and forwarded to the manufacturing division a list of wholesalers, upon receipt of which the manufacturing division requested each such wholesaler to execute a fair trade contract with the manufacturing division of the defendant.

There were 73 such wholesalers located in the same city or near a city or town where defendant's wholesale drug division traded. The annual aggregate of such sales is estimated by defendant to be about \$200,000.

Various forms of defendant's manufacturer-wholesaler and manufacturer-retailer fair trade agreements were used in connection with these sales. Defendant has admitted that in the
82 conduct of its business as a drug manufacturer it sell and ships McKesson products in interstate trade and commerce to wholesalers and retailers of drug store merchandise. The defendant's wholesale drug divisions, except the ones in New York and Brooklyn, sell and ship McKesson products across state lines to retailer customers located in states other than those from which sales and shipments are made.

Defendant contests proof of the existence of competition in three of these four categories. In category #1, defendant has admitted sales by its manufacturing division of \$283,462 during the fiscal year 1951-52, to ten wholesalers who "compete in the sale of McKesson products and other drug products" with seven of defendant's wholesale divisions. This represents only 8 per cent of the total sales made to all wholesalers. Moreover, defendant insists that a "substantial portion of the sales" made by its seven wholesale divisions "was made in portions of their trading areas where no overlap existed." Consequently, defendant urges that an issue of fact remains whether this competition with ten wholesalers is "substantial or *de minimis*."

With respect to category #2, involving direct sales by defendant's manufacturing division, amounting to about \$60,000, to sixteen retailers located in trading areas of twelve wholesalers of defendant's merchandise, defendant contends that such sim-

larity of geography is insufficient to establish a *prima facie* case of competition.

The third category, relating to sales by various of defendant's wholesale divisions to other wholesalers in identical trading areas, are characterized by defendant as mere courtesy sales of small amounts of defendant's brand merchandise. Here again defendant contends that the metes and bounds of trading area is not determinative of the existence of competition because of possible variations in types of merchandise and services offered by each, or in the kind of customers served by each.

The major inquiry is to ascertain the intent of Congress in excluding from the privilege of fair trade, price fixing contracts or agreements "between wholesalers, * * * or between persons, firms, or corporations in competition with each other." If defendant was merely a manufacturer, and nothing more, no question concerning its right to the privilege of fair trade would be presented. If defendant was a wholesaler, and nothing more, there would still be the nice question of construction whether such agreements are unprivileged "between wholesalers", only if they are "in competition with each other", or unprivileged between them regardless of competition.

The heart of the problem presented arises from defendant's dual role as manufacturer and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of defendant's capacities is carefully considered and the other happily ignored. Defendant argues that fair trade agreements are made by its manufacturing divisions with other wholesalers; plaintiff, that defendant's manufacturing and wholesale divisions are parts of a single corporate entity. Examining the legislative history of the Miller-Tydings and McGuire Acts only confirms the observation of Mr. Justice Jackson with respect to the former statute: "I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us." During debate of the McGuire Act, one Senator expressed his view that "many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity rather than as wholesalers and

retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers."⁸

Similar opinions were voiced by Representatives with respect to both Acts. Yet our inquiry is not "what the legislator meant; we ask only what the statute means."⁹ The peril of resorting to individual constructions of legislators is not merely that the mandate of the statute would cease to be embodied in its language and become unavailable as warning to the nation at large. It is also that such views may be no more than individual ones. As one Senator exclaimed with respect to the Miller-Tydings Act, "Regardless of the merits of this amendment, it is perfectly obvious that no 5 percent of the membership of the Senate will know anything whatever about the amendment when the Senate votes upon it. It is perfectly obvious that the Senate has reached the point of exhaustion in respect of the consideration of legislation; and if the Senate has any prudent consideration whatever for the country, instead of trying to do some of these intricate things it will quit and go home."¹⁰

The more carefully considered committee reports, unquestionably deserving weight in this dilemma, are replete with condemnation of "horizontal" and approbation of "vertical" fair trade arrangements.¹⁰ None of these reports come to grips with the instant problem, squarely and unequivocally. Although 35 not controlling here in any event, conflicting judicial and administrative opinion has suggested varying solutions of the problem.¹¹

We reject the suggestion that either of alternate horns must be followed in the dilemma of fair trade agreements with independent wholesalers by a manufacturer who is also a wholesaler, just as much as we believe the labels "vertical" and "horizontal" can offer small solace in a situation where such agreements are capable of operative effect in both of these directions.¹² This court is unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal per se fair trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition. The legislature might well make such appraisal so as to push the line of liability back to the threshold of the bare agreement itself. In their halls the voices of many interests affected may be heard. A judicial forum, where but a few such interests may be weighed, must await the outcome of the patient process of case by case, trial and error method of settling disputes one at a time. Early in the common law housebreakers who entered with felonious intent were branded burglars; and the

courts extended this with less severe punishment to attempts. Yet it remained for the legislature to make the necessary appraisal to seal the doom of the man found in the street with pick-lock in his pocket.

Despite occasional contrary intimations,¹³ direct price-fixing has been condemned as unlawful and an unreasonable restraint of trade without regard to the reasonableness of the prices fixed and irrespective of whether prices were actually raised or lowered.¹⁴ While this has been an early judicial development, direct price-fixing had been condemned as illegal per se at common law prior to the Sherman Act.

36 But such threshold per se doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality. The mischief of price fixing consists of the rigidity injected into the price structure which makes it unresponsive to normal pressures of supply and demand. Inflexibility inherent in fixation is an evil without regard to the reasonableness of the price. To permit private fixing would require constant judicial supervision of reasonableness and lead inevitably to the necessity of administrative price fixing by the government itself. To some extent similar mischief may attend direct price fixing by producers for wholesalers and retailers. Price competition on a single brand of merchandise is eliminated and not necessarily that occasioned by unrestrained price cutting and "loss leader" selling. Price reductions made possible by low cost store management, inventory control, or low-rent store location are not possible on such fair-traded items. A cushioned margin of profit may help inefficient distributors in the field and stifle the initiative of ones who would seek to increase their volume by price reductions based on economies.¹⁵ But the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise—the loss to the manufacturer of his good will, destruction of the independent retailer's competitive position and the consequent dilution of standards of quality for the consumer. And in the light of such legislative appraisal and approbation the per se judicial condemnation of direct price fixing is hardly applicable simply because the producer is also a wholesaler.

Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-wholesaler is insufficient
37 to make out a prima facie case of restraint of trade under the Sherman Act. Are all such agreements privileged or only some of them? If the latter, what then is the line of demarcation between valid and illegal ones? We think the test consists of a factual showing of illegality. And this is not met

simply by pointing to some restraint of competition. As Mr. Justice Brandeis observed: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."¹⁶

Since every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the "true test of legality" in the situation of the producer-wholesaler of dual capacity is whether some additional restraint destructive of competition is occasioned. A showing of actual or potential competition in such situation between the producer-controlled wholesaler and the independent one would be material but not determinative of such additional restraint destructive of competition. On the other hand, such agreements might violate the Sherman Act, without any showing of competition. If, for example, it could be established that a producer became a wholesaler, though not in competition with an independent wholesaler; and stipulated prices for his own and the independent wholesaler as a first step toward and with intent to gouge consumers, that might suffice *prima facie* as violation of the Sherman Act outside the privilege of the fair trade statutes. The weight then to be given to an item of proof, such as competition between the controlled and independent wholesaler, will necessarily depend upon circumstances. In a continuum of probability, it may

38. range from zero to evidence of preponderant probative force, depending upon the business setting. No inflexible standard should be laid down to govern in advance.

In the instant case, plaintiff has neither alleged nor made any factual showing of such additional restraint. Plaintiff suggests an evil similar to that condemned in *United States v. Masonite Corp. et al.*¹⁷ That case did not involve fair trade agreements, but rather a familiar attempt by a patentee, through agency and licensing arrangements, to extend a patent monopoly beyond limits of the patent and anti-trust statutes. Even considered as fair trade agreements a sufficient factual showing of illegality existed because several competing manufacturers, unrelated as buyers and sellers, agreed upon prices at which the product of one such manufacturer should be sold in competition with that of the others. Plaintiff claims that "the very existence of the price-fix on McKesson products may induce a competing wholesaler to buy McKesson products from the defendant rather than purchase other products that compete with McKesson products from some other manufacturer with whom the wholesaler is not in competi-

tion." Absent some factual showing that such is the case, we are unable to accept the proposition upon the force of its circumstantial probability, or at least to hold that its bare assertion amounts *prima facie* to a factual showing of illegality.

Upon the present state of the record then, plaintiff's motion for summary judgment must be denied without prejudice, of course, to its renewal upon a showing of additional uncontested facts in accordance with this opinion, or, if such facts are disputed, a showing of such additional facts on trial.

On two additional grounds, independent of those discussed above relating to defendant's dual capacity as manufacturer and wholesaler, plaintiff seeks summary judgment.

One is that defendant's fair trade contracts contain an illegal boycott provision by requiring the reselling buyer to agree that not only the purchaser but also "any subsequent purchaser will not, in turn, resell them at less than the prescribed net retail minimum prices published by Seller."¹⁵ Defendant denies present use of this clause, and an issue of fact is presented. The second ground concerns illegality of defendant's contracts with certain wholesalers located in Michigan, Georgia and Florida because allegedly in violation of the laws of those states. Defendant denies fair trade in these areas in violation of the State statute and accordingly a second issue of fact is presented. On these grounds then, plaintiff's motion for summary judgment is denied because of the existence of a triable issue of material fact.

Plaintiff's motion for summary judgment is accordingly denied. Dated, New York, N. Y., July 1, 1954.

THOS. F. MURPHY,
U. S. D. J.

40

FOOTNOTES

¹ Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. § 4.

² Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. A. § 1. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384.

³ Act of July 14, 1952, 66 Stat. 631-2, 15 U. S. C. A. § 45 (2).

⁴ 15 U. S. C. A. § 1; *id.* § 45 (5).

⁵ *Concurring in Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 397.

⁶ 98 Cong. Rec. 8870, 1952.

⁷ Hearings before Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong. 2d Sess., p. 13, Feb. 4, 1952; 81 Cong. Rec. 8141.

⁸ Holmes, *Collected Legal Papers* 207.

⁹ 81 Cong. Rec. 7492, July 23, 1937.

¹⁰ Report No. 2053, Senate Committee on the Judiciary, May 12, 1936, p. 2; Report No. 257, Senate Committee on the Judiciary, March 29, 1937, p. 2; Report No. 382, House Committee on the Judiciary, March 11, 1937, p. 2; Report No. 579, Senate Committee on the District of Columbia, July 6, 1937, p. 6; Report of Conference Committee on H. R. 7472, 81 Cong. Rec. 8137, 8138, 1937; H. R. Rep. No. 1437, Committee on Interstate and Foreign Commerce, 82d Cong. 2d Sess. 56, 1952; Sen. Rep. No. 1741, Committee on Interstate and Foreign Commerce, 82d Cong. 2d Sess. June 12, 1952.

¹¹ See *General Electric Co. v. S. Klein on the Square, Inc.*, Sup. Ct., N. Y. Co., Feb. 20, 1953, 129 N. Y. L. J. 583, CCH Trade Reg. Rep. § 67443 at par. 68,249-68,250; *Raxor Corp., et al. v. Goody*, Sup. Ct., N. Y. Co., April 2, 1953, CCH Trade Reg. Rep. § 67462 at par. 68,332; *Matter of Eastman Kodak Co.*, Docket No. 6040, Oct. 9, 1953, CCH Trade Reg. Rep. at par. 11,527; *Matter of Doubleday and Company, Inc.*, Docket No. 5897, F. T. C., Sept. 25, 1953, CCH Trade Reg. Rep. at par. 11,515; *Eastman Kodak Co. v. Aljan Camera Co., Inc.*, 131 N. Y. L. J. p. 7, col. 3-8, p. 8, col. 1 (June 3, 1954).

¹² Cf. *Matter of Doubleday and Company, Inc.*, Docket No. 5897, F. T. C. Sept. 25, 1953, CCH Trade Reg. Rep. at par. 11,515.

FOOTNOTES—Continued

41. ¹³ See *Chicago Board of Trade v. United States*, 246 U. S. 231; *National Association of Window Glass Mfrs. v. United States*, 263 U. S. 403; *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 179; *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 375.

¹⁴ *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States v. Trenton Potteries Co.*, 273 U. S. 392; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 214; *Swift & Co. v. United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co. v. United States*, 236 U. S. 20; *F. T. C. v. Pacific States Paper Trade Assn.*, 273 U. S. 52. See also *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U. S. 373, 408-409.

¹⁵ Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d Sess. 314, 318, 323 (1952).

¹⁶ *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

¹⁷ 316 U. S. 265.

¹⁸ *Cf. Masters, Inc. v. Sunbeam Corporation, et al.*, D. C. S. D. N. Y., 112 F. Supp. 268 with *Sunbeam Corporation v. Payless Drug Stores, et al.*, N. D. Cal., 113 F. Supp. 31 and Act of July 13, 1952, 66 Stat. 631-2, 15 U. S. C. A. § 45 (2).

42. In the United States District Court for the Southern
District of New York

Interrogatories propounded by the plaintiff

Filed September 28, 1953

To McKesson & Robbins, Incorporated:

[File endorsement omitted.]

[Title omitted.]

Please take notice that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The term "McKesson products" as used in these interrogatories is defined in paragraph 5 of the complaint.

1. State for the period July 1, 1951 to June 30, 1952 the total dollar volume of the defendant's sales of "McKesson products" to other wholesalers.

2. State for the period July 1, 1951 to June 30, 1952 the total dollar volume of the defendant's sales of "McKesson products" to other wholesalers that (to the knowledge of the defendant's officers, agents, or employees) competed with the defendant in the sale of such products and other products.

3. State for the period July 1, 1951 to June 30, 1952 the total dollar volume of sales to retailers of "McKesson products" by the wholesale drug divisions of the defendant that (to the knowledge of the defendant's officers, agents, or employees) competed with any other wholesaler in the sale of such products and other products.

43 4. State for the period July 1, 1951 to June 30, 1952 the total dollar volume of sales to retailers of "McKesson products" by the wholesale drug divisions of the defendant that did not (to the knowledge of the defendant's officers, agents, or employees) compete with any other wholesaler in the sale of "McKesson products". State separately the dollar volume of "McKesson products" sold to retailers by each such wholesale drug division of the defendant during said period.

5. State for the period July 1, 1951 to June 30, 1952 the location, including street address, of each wholesale drug division of the defendant. Indicate which of said wholesale drug divisions (to the knowledge of the defendant's officers, agents or employees) competed during said period with any other wholesaler in the sale of "McKesson products" and other products.

6. With respect to each wholesale drug division of the defendant that did not (to the knowledge of the defendant's officers, agents, or employees) compete during the period July 1, 1951 to June 30, 1952 with any other wholesaler in the sale of "McKesson products" and other products, state for said period (a) the geographical limits of the sales territory assigned to the division, (b) the geographical limits of the area in which sales and deliveries were made by the division as a matter of normal practice, (c) the geographical limits of the area in which salesmen employed by the division solicited business, (d) the name and address of the nearest other wholesaler to whom the defendant sold "McKesson products", (e) whether to the knowledge of the defendant's officers, agents or employees said nearest other wholesaler solicited business from retailer customers of the defendant, and (f) whether to the knowledge of the defendant's officers, agents or employees said nearest other wholesaler solicited business in the same trading area as the defendant.

7. List for the period July 1, 1951 to June 30, 1952 the name and address of each wholesaler that purchased "McKesson products" from the defendant and that (to the knowledge of the defendant's officers, agents, or employees) competed with the defendant in the sale of "McKesson products" and other products. State the dollar volume of "McKesson products" purchased during said period by each such wholesaler.

44 8. List for the period July 1, 1951 to June 30, 1952 the name and address of each wholesaler that purchased "McKesson products" from the defendant, but that did not (to the knowledge of the defendant's officers, agents or employees) compete with the defendant in the sale of "McKesson products" and other products. State the dollar volume of "McKesson products" purchased during said period by each such wholesaler.

9. List the "McKesson products" for the period July 1, 1951 to June 30, 1952. Indicate which of said products were manufactured by the defendant itself and which of said products were merely purchased by the defendant for resale under the defendant's trademark, brand, or name.

10. List the states in which the defendant fair-traded "McKesson products" for the period July 1, 1951 to June 30, 1952.

11. State whether Exhibit A attached hereto and entitled "Manufacturer-Wholesaler Fair Trade Agreement" represents the form of Fair Trade Agreement between the defendant and each of its wholesaler customers (in fair trade states) actually entered into by the defendant and each of its wholesaler customers (in fair trade states) during the period July 1, 1951 to June 30, 1952.

12. State whether Exhibit B attached hereto and entitled "Manufacturer-Retailer Fair Trade Agreement" represents the form of Fair Trade Agreement between the defendant and each of its retailer customers (in fair trade states) actually entered into by the defendant and each of its retailer customers (in fair trade states) during the period July 1, 1951 to June 30, 1952.

13. State for the period July 1, 1951 to June 30, 1952 whether the "Seller's published net wholesale prices" referred to in the paragraph numbered "1" in Exhibit A were (1) the defendant's own net wholesale prices applicable to sales to retailers by the wholesale drug divisions of the defendant, and (2) the prices at which the defendant offered to sell and sold "McKesson products" to its own retailer customers.

45 14. State for the period July 1, 1951 to June 30, 1952 whether the "net retail minimum prices published by Seller" referred to in the paragraph numbered "3" in Exhibit A were the same as the "prescribed net retail minimum prices published by Seller" referred to in the paragraph numbered "3" of Exhibit B.

15. State for the period July 1, 1951 to June 30, 1952 whether the defendant's sales and deliveries of "McKesson products" to the defendant's wholesaler customers, pursuant to Fair Trade Agreements of the Exhibit A type, were made by the wholesale drug divisions of the defendant.

16. State for the period July 1, 1951 to June 30, 1952 whether the defendant's sales and deliveries of "McKesson products" to the defendant's retailer customers, pursuant to Fair Trade Agreements of the Exhibit B type, were made by the wholesale drug divisions of the defendant.

17. State whether at any time during the period July 1, 1951 to June 30, 1952 the defendant changed its own published net whole-

sale prices without in fact giving reasonable notice of such change to its wholesaler customers as provided for by the paragraph numbered "4" of Exhibit A.

18. State for the period July 1, 1951 to June 30, 1952 whether any of the wholesalers to whom the defendant sold "McKesson products" resold such products to other wholesalers (to the knowledge of the defendant's officers, agents, or employees.)

19. State for the period July 1, 1951 to June 30, 1952 whether any of the retailers to whom the defendant sold "McKesson products" resold such products to other retailers (to the knowledge of the defendant's officers, agents, or employees.)

20. State for the period July 1, 1951 to June 30, 1952 whether the defendant's wholesale drug divisions sold and shipped "McKesson products" across state lines to retailer and/or wholesaler customers located in states other than those from which the sales and shipments were made. If some of the defendant's

46 Wholesale drug divisions did not sell and ship "McKesson products" across state lines to retailer and/or wholesaler customers located in states other than those from which the sales and shipments were made, state which divisions did make such interstate sales and shipments and which did not.

ALLEN A. DOBEY,
WILLIAM F. ROGERS,
Trial Attorneys.

RICHARD B. O'DONNELL,
Special Assistant to the Attorney General.

47 EXHIBIT A TO INTERROGATORIES—MANUFACTURER-
WHOLESALE FARM TRADE AGREEMENT

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

In consideration of the sale to the Buyer of commodities which bear the trademark, brand, or name of the Seller and the promises by the Buyer, it is agreed:

1. The Buyer will not advertise, offer for sale, sell, or resell any of the Seller's commodities shown on Schedule A attached hereto at prices less than the Seller's published net wholesale prices.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodities in combination or otherwise except as herein provided.

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchasers will not, in turn, resell them at less than the net retail minimum prices published by Seller.

4. The Seller reserves the right to change said published prices

and to add or eliminate commodities from the attached schedule at any time upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this 1st day of June 1951.

McKESSON & ROBBINS LABORATORIES,
Fairfield, Connecticut.

By W. E. DEWELL, *Vice President.*

Buyer

Street

City and State
By -----
Title

48 EXHIBIT B TO INTERROGATORIES—MANUFACTURER-
RETAILER FAIR TRADE AGREEMENT

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

1. The Buyer, by accepting delivery from Seller of any fair traded commodity bearing the trademark, brand, or name of Seller, agrees that the prescribed minimum resale price of that commodity shall be the applicable net retail minimum price published by the Seller and agrees not to resell such commodity, by direct or indirect means, at less than that price.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodity in combination or otherwise except as herein provided.

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchaser will not, in turn, resell them at less than the prescribed net retail minimum prices published by Seller.

4. The Seller reserves the right at any time to change said published prices and to add or eliminate commodities to or from those presently fair traded upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement

is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this _____ day of _____ 1951.

MCKESSON & ROBBINS LABORATORIES,
Fairfield, Connecticut.

By W. E. DEWELL, Vice President.

Buyer

Street

City and State
By _____
Title

49 Affidavit of service by mail [omitted in printing]

50 Affidavit of service of answers to interrogatories
[omitted in printing]

51 In the United States District Court for the Southern
District of New York

Answers of defendant, McKesson & Robbins, Incorporated, to
interrogatories on behalf of the United States

Filed October 14, 1953

[Title omitted.]

The answers to all the Interrogatories are furnished by Wilbur E. Dewell, Vice President and Manager of McKesson Laboratories, the Manufacturing Division of defendant, located at Bridgeport, Connecticut, which will hereinafter be referred to as the "Manufacturing Division". Mr. Dewell's address is Hill Farm Road, Fairfield, Connecticut. Unless otherwise specified, all answers relate to the period July 1, 1951 to June 30, 1952.

1. Defendant's sales to wholesalers (with insignificant exceptions resulting from sales of a courtesy nature) are not made by the wholesale divisions of defendant but are made by the Manufacturing Division of defendant as a manufacturer. The total dollar volume of sales of McKesson products by the Manufacturing Division of defendant to wholesalers (not including sales to defendant's wholesale divisions) aggregated \$763,767.

2. None of the wholesalers to whom the Manufacturing Division of defendant sold McKesson products competed
52 with the Manufacturing Division. The total dollar volume of sales of McKesson products by the Manufacturing Division of defendant to wholesalers whose trading areas were sub-

stantially the same as those of wholesale drug divisions of McKesson, amounted to \$212,474, and such sales to wholesalers whose trading areas although not the same materially overlapped with those of defendant's wholesale divisions, amounted to \$70,988.

3. The total dollar volume of sales to retailers of McKesson products by wholesale drug divisions of the defendant in trading areas where other wholesalers of McKesson products had substantially similar or materially overlapping trading areas amounted to \$786,309. To this amount should be added the mark-up of defendant's wholesale divisions, since the amount stated represents the price at which such merchandise was sold to defendant's wholesale divisions by the Manufacturing Division of defendant. A substantial portion of the sales so made by defendant's wholesale drug divisions was made in portions of their trading areas where no overlap existed.

4. The total dollar volume of sales to retailers of McKesson products by the wholesale drug divisions of the defendant that did not, in the belief of the undersigned, compete with any other wholesaler of McKesson products amounted to \$7,520,368. The separate dollar volume of each such wholesale drug division is set forth in the attached statement marked "Annex to Item 4". To these amounts should be added the mark-up of the defendant's wholesale divisions (see answer to Interrogatory 3):

53 5. The attached statement marked "Annex to Item 5" is a list of the wholesale drug divisions of the defendant with the street addresses thereof. The drug divisions located at New York, N. Y., Brooklyn, N. Y., Yonkers, N. Y., Cairo, Illinois, Detroit, Michigan, and Pittsburgh, Pennsylvania, sold McKesson products in the same trading area or in trading areas substantially overlapping with those of other wholesalers of McKesson products.

6. Although the trading areas in question developed historically rather than by assignment of sales territories, for practical purposes the answers to clauses (a), (b) and (c) of this Interrogatory are substantially identical. Attached hereto marked "Annex to Item 6" is a map on which are outlined the trading areas of each of defendant's wholesale divisions (with the exception of those divisions specifically mentioned in the last sentence of the answer to Interrogatory 5) bordering upon the trading area of any wholesaler to whom the Manufacturing Division of defendant made sales of McKesson products and with which, in the opinion of the undersigned, a wholesale division of defendant was not in competition. No answer is being made to this item with respect to trading areas of defendant's wholesale divisions which are so remote from the wholesalers of McKesson products with which, in the opinion of the undersigned, no division of defendant is in

competition, as to be of no relevance. As appears from the map, the wholesalers to whom the Manufacturing Division of defendant sells McKesson products are in a relatively concentrated area in which McKesson does not have wholesale divisions. For example, among the natural trading areas contained in this area are Philadelphia, Pa., Washington, D. C., and Baltimore, Maryland, in none of which defendant has a wholesale division.

The wholesalers of McKesson products with whom, in the opinion of the undersigned, no McKesson wholesale division is in competition, as requested in clause (d) of Interrogatory 6, are indicated on the attached map and in the key annexed thereto. With respect to clauses (e) and (f) of Interrogatory 6, to the best of the undersigned's knowledge and belief, the trading areas of the McKesson wholesale divisions set forth in the annexed map and the wholesalers to whom McKesson products were sold by defendant's Manufacturing Division do not involve any material overlapping or duplication. In general, the proportion of the available business obtained by defendant's wholesale divisions is much greater in the center of the trading areas indicated on the attached map than at the perimeter of those areas where it is proportionately very small.

7. Attached hereto and marked "Annex to Item 7" is a list of the wholesalers to whom the Manufacturing Division of defendant sold McKesson products and whose trading areas overlapped, in whole or in part, with that of a wholesale division of defendant, and the dollar volume of sales of McKesson products by the Manufacturing Division to each such wholesaler during that period.

8. Attached hereto and marked "Annex to Item 8" is a list of the wholesalers to whom the Manufacturing Division of defendant sold McKesson products but whose trading area did not, to the best of the undersigned's knowledge and belief, compete with wholesale divisions of the defendant in the sale of McKesson products and other products, including the dollar volume purchased by each such wholesaler during the period.

9. Attached hereto and marked "Annex to Item 9" is a list of McKesson products. None of these products was merely purchased by the defendant for resale under the defendant's trademark, brand or name, but all are products manufactured by defendant which in varying degrees required preparation, processing, manufacturing or packaging, and all of which required inspection and supervision to insure their adherence to satisfactory standards of quality, purity and cleanliness and all of which are in competition with products manufactured by other manufacturers and sell under their trade marks, brands or names.

10. The Manufacturing Division of defendant fair traded its products in all states which had fair trade laws and in which it was legally permissible to do so.

11. Exhibit A attached to the Interrogatories and entitled "Manufacturer-Wholesale Fair Trade Agreement" represented the form of fair trade agreement between the Manufacturing Division of defendant and its wholesaler customers in fair trade states actually entered into. That agreement is no longer in effect.

12. Exhibit B attached to the Interrogatories and entitled "Manufacturer-Retailer Fair Trade Agreement" represented the form of fair trade agreement between the Manufacturing Division of defendant and each of the retailer customers (in fair trade states), to whom the Manufacturing Division of defendant made direct sales. In the case of other retailers,

the so-called "legend" form of agreement was entered between wholesalers and retailers by stamping the legend on the invoice, which practice was also followed by defendant's wholesale divisions in their resales to retailers of products purchased by those wholesale divisions from the Manufacturing Division. The Manufacturer-Retailer Fair Trade Agreement contained in Exhibit B of the Interrogatories is no longer in effect, and the provision of the wholesale agreement (paragraph 3 of Exhibit A attached to the Interrogatories) relating to the procurement of agreements from retailers by wholesalers was rendered unnecessary as a result of the passage of the McGuire Act.

13. The sellers' published net wholesale prices referred to in the paragraph numbered 1 of the Exhibit A attached to the Interrogatories were (1) the defendant's own net wholesale prices applicable to sales to retailers by the wholesale drug divisions of the defendant, and (2) the prices at which the defendant's wholesale drug division offered to sell and sold McKesson products to their own retailer customers.

14. The net retail minimum prices published by seller, referred to in paragraph numbered 3 of Exhibit A attached to the Interrogatories, were the same as the prescribed net retail minimum prices published by seller referred to in the paragraph numbered 3 of Exhibit B.

15. The sales to wholesaler customers of defendant pursuant to fair trade agreement of the Exhibit A type were not made by the wholesale drug divisions of the defendant, but were made by its Manufacturing Division and deliveries were made from Bridgeport, Connecticut with insignificant exceptions by reason of sales of a courtesy nature.

16. The sales and deliveries of McKesson products to the defendant's retailer customers were not made pursuant to fair trade agreement of the Exhibit B type by the wholesale drug

divisions of the defendant. The wholesale divisions of defendant in their resales to retailer customers of McKesson products used the so-called legend form of agreement as did other wholesalers of McKesson products. This practice has since been discontinued as a result of the McGuire Act.

17. The defendant did not change its own published net wholesale prices without in fact giving reasonable notice of such change to its wholesaler customers as provided for by the paragraph numbered 4 of Exhibit A attached to the Interrogatories.

18. The undersigned does not have any knowledge or information concerning sales by wholesalers to whom the Manufacturing Division of defendant sold McKesson products to other wholesalers.

19. The undersigned does not have any knowledge or information relating to resale by retailers to whom the wholesale divisions of defendant sold McKesson products to other retailers.

20. In nearly every case wholesale drug divisions of defendant sell and ship McKesson products across state lines to retail customers located in states other than those from which sales and shipments were made. Relevant exceptions to this are the New York, N. Y., and Brooklyn, N. Y., divisions.

MCKESSON & ROBBINS, INCORPORATED,

By R. J. PLATT, Assistant Secretary.

59 [Duly sworn to by jurat omitted in printing.]

60

ANNEX TO ITEM 4

Name	Amount
Newark, N. J.	\$211,023
Albany, N. Y.	168,192
Buffalo, N. Y.	114,939
Rochester, N. Y.	111,685
Syracuse, N. Y.	53,658
Boston, Mass.	208,192
New Haven, Conn.	126,097
Providence, R. I.	95,820
Springfield, Mass.	56,755
Augusta, Ga.	76,201
Columbia, S. C.	128,677
Jacksonville, Fla.	123,409
Miami, Fla.	119,063
Orlando, Fla.	41,155
Tampa, Fla.	98,823
Macon, Ga.	138,898
Columbus, Ga.	57,683
New Orleans, La.	99,875
Mobile, Ala.	154,516
Birmingham, Ala.	94,080
Huntington, W. Va.	108,945
Roanoke, Va.	64,756
Dallas, Tex.	226,067
El Paso, Tex.	39,978
Houston, Tex.	162,020
Little Rock, Ark.	61,857

Name	Amount
St. Louis, Mo.	127,973
San Antonio, Tex.	63,200
Ft. Smith, Ark.	31,689
Jackson, Miss.	84,428
Memphis, Tenn.	179,673
Chattanooga, Tenn.	81,673
Nashville, Tenn.	69,253
Louisville, Ky.	87,014
Amarillo, Tex.	36,616
Oklahoma City, Okla.	120,991
Tulsa, Okla.	37,347
Akron, Ohio	142,884
Cleveland, Ohio	227,408
Omaha, Neb.	103,063
Sioux City, Ia.	86,085
Cincinnati, Ohio	115,244
Billings, Mont.	51,048
Minneapolis, Minn.	164,209
St. Paul, Minn.	35,629
Burlington, Ia.	73,846
Cedar Rapids, Ia.	74,616
Denver, Colo.	75,945
Kansas City, Mo.	208,246
Rock Island, Ill.	37,125
Chicago, Ill.	315,607
Milwaukee, Wis.	61,230
Peoria, Ill.	75,628
Wichita, Kan.	89,961
Los Angeles, Cal.	322,873
Phoenix, Ariz.	56,749
San Diego, Cal.	50,892
61 N. Hollywood, Cal.	49,008
San Francisco, Cal.	194,813
Fresno, Cal.	97,373
Oakland, Cal.	80,233
Ogden, Utah	109,826
Portland, Oreg.	231,825
Sacramento, Cal.	109,643
Seattle, Wash.	297,652
Spokane, Wash.	79,260
Honolulu, T. H.	37,157

Note

See Card 2 for Page 36, and
the fold-in "Annex to Item Nine."

64

ANNEX TO ITEM 7

Name	Amount
Towns & James, Brooklyn, N. Y.	\$9, 871
Long Island Drug, Jamaica, N. Y.	33, 807
Progressive Drug, New York, N. Y.	11, 196
Schieffelin Drug, New York, N. Y.	5, 712
Kolb Bros. Drug, Paducah, Ky.	3, 276
Federal-Rice Drug, Pittsburgh, Pa.	151, 888
Hazeltine & Perkins, Grand Rapids, Mich.	9, 900
Ohio Valley Drug, Wheeling, W. Va.	17, 903
Clarksburg Drug, Clarksburg, W. Va.	11, 918
Waiding, Kinnan & Marvin, Toledo, Ohio.	27, 991

65

ANNEX TO ITEM 8

Name	Amount
District Wholesale Drug, Washington, D. C.	\$46, 149
H. B. Gilpin Co., Washington, D. C.	25, 422
H. B. Gilpin Co., Baltimore, Md.	21, 472
Kauffman-Lattimer, Columbus, Ohio.	79, 144
Chas. Leich & Co., Evansville, Ind.	5, 842
M. Brenner & Son, Harrisburg, Pa.	31, 865
Kiefer-Stewart Drug, Indianapolis, Ind.	72, 639
H. B. Gilpin Co., Norfolk, Va.	63, 453
Krull, Whlse. Drug, Philadelphia, Pa.	6, 027
Shoemaker & Busch, Philadelphia, Pa.	20, 107
Smith, Kline & French, Philadelphia, Pa.	18, 330
Owens & Minor Drug, Richmond, Va.	43, 019
Pennsylvania Whlse. Drug, Scranton, Pa., Wilkes-Barre, Pa., Lansford, Pa.	46, 836

67 In the United States District Court for the Southern
District of New York

Supplemental interrogatories propounded by the plaintiff

Filed Oct. 30, 1953

To McKesson & Robbins, Incorporated:

[File endorsement omitted.]

[Title omitted.]

Please take notice that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within 15 days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The term "McKesson products" as used in these interrogatories is defined in paragraph 5 of the complaint.

1. State for the period July 1, 1951 to June 30, 1952 whether the manufacturing division of the defendant and the wholesale drug divisions of the defendant were separately incorporated.

2. With respect to "sales" of McKesson products by the manufacturing division of the defendant to the wholesale drug divisions of the defendant, state for the period July 1, 1951 to June 30, 1952 how "payment" for such products was made to the manufacturing division of the defendant by the wholesale drug divisions of the defendant, that is, by cash, check, money order, or other means, and state whether a bill of sale covering the "sale" of such products by the manufacturing division of the defendant to the wholesale drug divisions of the defendant was executed by the manufacturing division of the defendant for the purpose of transferring title to such products from the manufacturing division of the defendant to the wholesale drug divisions of the defendant.

68 3. With respect to the wholesalers listed in the Annex to Item 7 of the defendant's answers to the plaintiff's first set of interrogatories, state for the period July 1, 1951 to June 30, 1952 whether, to the knowledge of the defendant (its officers, the managers of its wholesale drug divisions, or salesmen employed by its wholesale drug divisions to solicit orders from retailers for McKesson products and other drug products), the defendant solicited orders for McKesson products and other drug products from the same retailers, or many of the same retailers, from whom the wholesalers listed in the Annex to Item 7 solicited orders for McKesson products and other drug products.

4. State for the period of July 1, 1951 to June 30, 1952 whether any of the McKesson products were patented, and if so list the patented products.

5. State for the period July 1, 1951 to June 30, 1952 whether the defendant sold McKesson products to any wholesaler or wholesalers in the states of Georgia, Florida, or Michigan pursuant to a Fair Trade Agreement of the type attached as Exhibit A to the plaintiff's first set of interrogatories, and if so list the name and address of each such wholesaler.

6. State for the period July 1, 1951 to June 30, 1951 whether the defendant fair traded McKesson products in the states of Georgia, Florida, and Michigan.

7. State whether Exhibit 1 attached hereto represents a letter with enclosed form of Fair Trade Agreement sent by the defendant to each of its retailer customers on or about June 1, 1951. If Exhibit 1 was not sent by the defendant to each of its retailer customers but only to some of its retailer customers, state upon what basis the defendant selected the retailer customers to whom the letter should be sent.

8. State for the period July 1, 1951 to June 30, 1952 whether orders for McKesson products from retailers to whom the defendant sent Exhibit 1 (and who executed the enclosed fair trade agreement) were solicited and/or received initially by the officers, salesmen, or other agents or employees of the wholesale drug divisions of the defendant, or by the officers, salesmen, or other agents or employees of the manufacturing division of the defendant, or by the officers, salesmen, or other agents or

employees of both the wholesale drug divisions of the

defendant and the manufacturing division of the defendant.

State for the period July 1, 1951 to June 30, 1952 whether deliveries of McKesson products by the defendant to retailer

customers who signed the Fair Trade Agreement enclosed with Exhibit 1 were made direct from Bridgeport, or were made by

the wholesale drug divisions of the defendant, or both. State for the period July 1, 1951 to June 30, 1952 whether payment for

McKesson products sold to retailer customers who signed the Fair Trade Agreement enclosed with Exhibit 1 was initially made

by the retailer customers to the wholesale drug divisions of the defendant, or direct to the manufacturing division of the defendant, or both. Identify by name and address the "appointed

distributors" referred to in Exhibit 1.

9. State whether Exhibit 2 attached hereto represents a letter and attached form of Fair Trade Agreement and attached copy

of telegram sent by the defendant to each of its wholesaler customers on or about June 1, 1951. If Exhibit 2 was not sent by the

defendant to each of its wholesaler customers, but only to some of its wholesaler customers, state upon what basis the defendant

selected the wholesaler customers to whom the letter should be sent.

10. State for the period July 1, 1951 to June 30, 1952 whether orders for McKesson products from wholesalers to whom the

defendant sent Exhibit 2 (and who executed the attached Fair Trade Agreement) were solicited and/or received initially by the

officers, salesmen, or other agents or employees of the wholesale drug division of the defendant, or by the officers, salesmen, or

other agents or employees of the manufacturing division of the defendant, or by the officers, salesmen, or other agents or employees

of both the wholesale drug divisions of the defendant and the manufacturing division of the defendant. State for the period

July 1, 1951, to June 30, 1952 whether deliveries of McKesson products by the defendant to wholesaler customers who signed

the form of Fair Trade Agreement attached to Exhibit 2 were made direct from Bridgeport, or were made by the wholesale drug

divisions of the defendant, or both. State for the period July 1, 1951 to June 30, 1952 whether payment for McKesson products

70 sold to wholesaler customers who signed the form of Fair Trade Agreement attached to Exhibit 2 was initially made by the wholesaler customers to the wholesale drug divisions of the defendant, or direct to the manufacturing division of the defendant, or both.

11. Identify by name and position held the "Chief House Executives" referred to at the top of Exhibit 3 attached hereto. State whether these executives were solely executives of the wholesale drug divisions of the defendant or whether these "Chief House Executives" or one or more of them were also executives of the manufacturing division of the defendant. If the "Chief House Executives," or any of them, also served as executives of the manufacturing division, indicate generally the scope of their authority over the manufacturing division.

12. State whether Exhibit 3 attached hereto was circulated among the "Chief House Executives" on or about June 1, 1951. State the position held by H. C. Nolan with the defendant during the period July 1, 1951 to June 30, 1952.

13. State whether Exhibit 4 attached hereto was circulated among the "Chief House Executives" on or about June 8, 1951.

14. State whether Exhibit 5 attached hereto was circulated among the "Chief House Executives" on or about June 6, 1951. List the name and address of each wholesaler (to whom the defendant's wholesale divisions sold McKesson products) that was forwarded to Mr. Dewell at Bridgeport pursuant to the instructions contained in the second paragraph of Exhibit 5. State for the period July 1, 1951 to June 30, 1952 whether orders for McKesson products from these wholesalers were solicited and/or received by officers, salesmen, or other agents or employees of the wholesale drug divisions of the defendant, whether deliveries of McKesson products to these wholesalers were made by the wholesale drug divisions of the defendant, and whether payment for McKesson products sold to these wholesalers by the wholesale drug divisions of the defendant was initially received by the wholesale drug divisions of the defendant.

71 15. State whether Exhibit 6 attached hereto represents a letter with attached form of Fair Trade Agreement sent by the defendant to each of its wholesaler customers on or about June 8, 1951. If Exhibit 6 was not sent by the defendant to each of its wholesaler customers, but only to some of its wholesaler customers, state upon what basis the defendant selected the wholesaler customers to whom the letter should be sent. List the name and address of the wholesaler customers to whom the letter was sent.

16. State whether the statement appearing in the second paragraph of Exhibit 6, to the effect that "You have in the past secured

your McKesson manufactured products from one of our authorized distributors and in turn have supplied your retail accounts" was a true statement of the past practice with respect to those wholesalers to whom Exhibit 6 was sent, and whether this practice was continued during the period July 1, 1951 to June 30, 1952. Identify by name and address the "authorized distributors" referred to therein. If the "authorized distributors" referred to therein included the wholesale drug divisions of the defendant, state why the defendant's wholesale drug divisions rather than the defendant's manufacturing division did not prepare and submit the form of Fair Trade Agreement for execution by their wholesaler customers.

17. List the name and address of each wholesaler to whom Exhibit 6 was sent who executed the form of Fair Trade Agreement attached thereto. State for the period July 1, 1951 to June 30, 1952 whether these wholesalers purchased McKesson products from the wholesale drug divisions of the defendant subject to a Manufacturer-Wholesaler Fair Trade Agreement of the type attached to Exhibit 6.

18. State the approximate dollar volume of McKesson products sold by the wholesale drug divisions of the defendant to wholesalers for the period July 1, 1951 to June 30, 1952. State for the period July 1, 1951 to June 30, 1952 whether the wholesale drug divisions of the defendant sold McKesson products (1) to the wholesalers listed in the Annex to Item 7 of the defendant's answers to the plaintiff's first set of interrogatories, and (2) to the wholesalers listed in the Annex to Item 8 of the defendant's answers to the plaintiffs first set of interrogatories. State

72 whether all sales of McKesson products to wholesalers by the wholesale drug divisions of the defendant during the period July 1, 1951 to June 30, 1952 were made subject to Fair Trade agreements of the type attached as Exhibit A to the plaintiff's first set of interrogatories. State for the period July 1, 1951 to June 30, 1952 whether the manufacturing division of the defendant or the wholesale drug divisions of the defendant made any sales of McKesson products to any wholesaler who had not executed such a Fair Trade Agreement.

19. State for the period July 1, 1951 to June 30, 1952 whether, to the knowledge of the defendant (its officers or agents) the manufacturing division of the defendant solicited orders for McKesson products from any retailer or retailers from whom any of the wholesalers listed in the Annex to Item 8 (of the defendant's answers to the plaintiff's first set of interrogatories) solicited orders for McKesson products and other drug products. State for the period July 1, 1951 to June 30, 1952 whether, to the knowledge of the defendant (its officers or agents), the manufacturing

division of the defendant made any direct sales of McKesson products to any retailer or retailers from whom any of the wholesalers listed in the Annex to Item 8 (of the defendant's answers to the plaintiff's first set of interrogatories) solicited orders for McKesson products and other drug products. If the manufacturing division of the defendant did make any such direct sales to any such retailer or retailers, list the name and address of the retailer or retailers to whom such direct sales were made, the dollar volume of sales of McKesson products made by the defendant to such retailer or retailers for the period July 1, 1951 to June 30, 1952, and the name and address of the wholesaler or wholesalers listed in the aforementioned Annex to Item 8 that solicited orders for McKesson products and other drug products from said retailer or retailers.

20. State for the period July 1, 1951 to June 30, 1952 whether the defendant (including both its wholesale drug divisions and its manufacturing division) made any sales of McKesson products to any wholesaler not listed in either the Annex to Item 7 or the Annex to Item 8 of the defendant's answers to the plaintiff's first set of interrogatories. If the answer is in the affirmative, list the name and address of each such other wholesaler.

21. State whether Exhibit 7 attached hereto represents a letter sent by the defendant to each of its wholesaler customers on or about June 8, 1951. If Exhibit 7 was not sent by the defendant to each of its wholesaler customers but only to some of its wholesaler customers, state upon what basis the defendant selected the wholesaler customers to whom the letter was sent.

22. State whether a Manufacturer-Wholesaler Fair Trade Agreement of the type attached as Exhibit A to the plaintiff's first set of interrogatories was entered into between the manufacturing division of the defendant as "seller" and any or all of the wholesale drug divisions of the defendant as "buyer" on or about June 1, 1951 or at any time from June 1, 1951 to June 30, 1952. If the answer is in the negative state whether any agreement in any form was entered into during said period between the manufacturing division of the defendant as "seller" and any or all of the wholesale drug divisions of the defendant as "buyer" for the purpose of controlling the "resale" price of McKesson products on the "resale" of such products by the wholesale drug divisions of the defendant. If no such agreement was entered into, explain why.

ALLEN A. DOBEY,
WILLIAM F. ROGERS,
Trial Attorneys.

RICHARD B. O'DONNELL,
Special Assistant to the Attorney General.

74 EXHIBIT 1 TO SUPPLEMENT INTERROGATORIES
McKESSON & ROBBINS,
INCORPORATED, LABORATORIES,
Bridgeport 9, Connecticut.

June 1, 1951.

The enclosed fair trade agreement, when signed by your good company, will have the effect of keeping our minimum published prices effective in all states having fair trade laws.

Many of our fine retail accounts have raised the question as to our future policy. This is our answer in support of the principle of fair trade:

We propose to do business in fair trade states only with customers having fair trade contracts with us or our appointed distributors.

Enclosed find our complete price schedule which confirms fair trade minimums now in effect.

Please sign and return promptly one copy of the enclosed agreement retaining the other copy for your files.

Sincerely,

McKESSON LABORATORIES,
W. E. DEWELL,

Vice President.

WED:M.
Enclosures.

75 MANUFACTURER-RETAILER FAIR TRADE AGREEMENT

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

1. The Buyer, by accepting delivery from Seller of any fair traded commodity bearing the trademark, brand, or name of Seller, agrees that the prescribed minimum resale price of that commodity shall be the applicable net retail minimum price published by the Seller and agrees not to resell such commodity, by direct or indirect means, at less than that price.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodity in combination or otherwise except as herein provided.

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchaser will not, in turn, resell them at less than the prescribed net retail minimum prices published by Seller.

4. The Seller reserves the right at any time to change said published prices and to add or eliminate commodities to or from those presently fair traded upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this _____ day of _____ 1951.

MCKESSON & ROBBINS LABORATORIES,
Fairfield, Connecticut.

By W. E. DEWELL, Vice President.

Buyer

Street

City and State
By _____
Title

76 EXHIBIT 2 TO SUPPLEMENTAL INTERROGATORIES

MCKESSON & ROBBINS,
INCORPORATED, LABORATORIES,
Bridgeport 2, Connecticut,
June 1, 1951.

Attached is a new fair trade contract between us as the manufacturer and you as one of our wholesale distributors covering the products which we manufacture.

Under the contract, you agree to sell products of our manufacture at not less than the stipulated fair trade minimum and further agree to enter into a fair trade contract covering our products with each of your customers to whom any of those products are sold.

The Fair Trade Law of your state provides that a manufacturer may obligate its distributors to require their customers to agree to observe the established minimum resale prices.

By placing the following legend on each of your invoices, it is our opinion, concurred in by our legal counsel, that by the acceptance of the merchandise on that invoice each of your customers will have entered into a legal fair trade contract and will be bound to observe the published fair trade minimum.

FAIR TRADE AGREEMENT

Purchaser, by accepting delivery from Seller of any fair traded commodity, agrees not to resell such commodity, by direct or indirect means, at less than the prescribed net retail minimum price published by the Producer or Distributor whose trade-

mark, brand or name appears on the commodity. This agreement not applicable to sales in nonfair trade states or
77 District of Columbia.

It is also our opinion that, as long as the legend is legible, it may appear on either the face or back of each invoice just like any other term of purchase and may be printed, typed, mimeographed, or stamped.

We as the manufacturer have previously posted with the Fair Trade Committee in each state having a fair trade statute a list of our minimum resale prices. Those minimum prices continue in effect.

This is our answer to our customers who ask what we are going to do in legal support of fair trade:

We are going to sell our products only to those who enter into a fair trade contract with us or our appointed distributors.

Please sign and return promptly one copy of the enclosed agreement retaining the other copy for your files.

Sincerely,

McKESSON LABORATORIES,
W. E. DEWELL,

Vice President.

WED: M.
Enclosures.

78 MANUFACTURER-WHOLESALE FAIR TRADE AGREEMENT

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

In consideration of the sale to the Buyer of commodities which bear the trademark, brand, or name of the Seller and the promises by the Buyer, it is agreed:

1. The Buyer will not advertise, offer for sale, sell, or resell any of the Seller's commodities shown on Schedule A attached hereto at prices less than the Seller's published net wholesale prices.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodities in combination or otherwise except as herein provided:

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchasers will not, in turn, resell them at less than the net retail minimum prices published by Seller.

4. The seller reserves the right to change said published prices and to add or eliminate commodities from the attached schedule at any time upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this _____ day of _____ 1951.

MCKESSON & ROBBINS LABORATORIES,

Fairfield, Connecticut.

By W. E. DEWELL, *Vice President.*

 Buyer

 Street

 City and State
 By _____
 Title

79 TELEGRAM TO BE SENT BY BRIDGEPORT TO ALL WHOLESALERS TO WHOM BRIDGEPORT SENT JUNE 1ST LETTER

Supplementing our letter June 1st our Fair Trade Contract intended, of course, to apply to our manufactured products only. Therefore, suggest legend mentioned that letter be changed to read "Fair Trade Agreement. Purchaser by accepting delivery of any commodity manufactured by McKesson & Robbins, Incorporated, agrees not to resell such commodity, by direct or indirect means at less than the prescribed net retail minimum price published by McKesson & Robbins, Incorporated. This agreement not applicable to sales in non-fair trade states or District of Columbia." Letter follows.

80 EXHIBIT 3 TO SUPPLEMENTAL INTERROGATORIES
 FOR ATTENTION OF CHIEF HOUSE EXECUTIVES

Number BE-784

Date June 1, 1951

Bridgeport's New Fair Trade Plan

We have just received from Bridgeport a description of the plan they will use henceforth in distributing the products they manufacture to the wholesale and retail trade in those states having fair trade laws. The plan is designed to sell McKesson manufactured products only to those wholesale and retail distributors who accept a fair trade contract on those products. Bridgeport believes, and their belief is supported by good legal opinion, that their plan is completely legal in those states having fair trade laws and under the interpretation of the Miller-Tydings amend-

ment recently given by the Supreme Court. It is the first effective answer, therefore, to the question asked so often recently: "How can a manufacturer now operate legally to protect his trademarks?"

Our Bridgeport Laboratories, a manufacturer, will make a fair trade contract with everyone of its customers. The manufacturer-wholesaler contract provides that the wholesaler shall sell McKesson labelled products at not less than a stated minimum price, and further that he will sell those products only to customers of his who enter into a contract with him to resell those products at not less than an announced minimum retail price.

Effective at once all our wholesale drug divisions will follow the terms of Bridgeport's new manufacturer-wholesaler contract. To do this we will:

1. Rubber stamp all customer invoices and warehouse copies of these invoices with the following legend:

"FAIR TRADE AGREEMENT. Purchaser, by accepting delivery from Seller of any fair traded commodity, agrees not to resell such commodity, by direct or indirect means, at less than the prescribed net retail minimum price published by the Producer or Distributor whose trademark, brand or name appears on the commodity. This agreement not applicable to sales in nonfair trade states or District of Columbia."

Each invoice then becomes a legal fair trade contract and customers accepting the merchandise are bound by its terms. (As soon as practical invoices and warehouse copies will be imprinted with this legend.)

2. Not sell our manufactured products to any customer who tells us that he will not accept a fair trade contract from us. (A list of those customers must be made by each Division and control exercised as is done with Rx legend merchandise.)

3. Explain this new plan to all our salesmen immediately so that they in turn can explain it to their accounts.

81 The present retail and wholesale minimum resale prices established by Bridgeport continue in effect. And in the future when changes in minimum prices are made, they will be published in the same manner and by the same means used heretofore.

This bulletin does not apply to our Divisions located in nonfair trade states. These are the states of Texas, Missouri, Vermont and the District of Columbia.

Attached for your information is a copy of Bridgeport's manufacturer-wholesaler contract.

Sincerely,

H. C. NOLEN.

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

In consideration of the sale to the Buyer of commodities which bear the trademark, brand, or name of the Seller and the promises by the Buyer, it is agreed:

1. The Buyer will not advertise, offer for sale, sell, or resell any of the Seller's commodities shown on Schedule A attached hereto at prices less than the Seller's published net wholesale prices.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodities in combination or otherwise except as herein provided.

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchasers will not, in turn, resell them at less than the net retail minimum prices published by Seller.

4. The Seller reserves the right to change and published prices and to add or eliminate commodities from the attached schedule at any time upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this _____ day of _____ 1951.

MCKESSON & ROBBINS LABORATORIES,

Fairfield, Connecticut.

By W. E. DEWELL, *Vice President.*

Buyer

Street

City and State

By

Title

83 TELEGRAM TO BE SENT BY H. C. NOLEN TO ALL MCKESSON DIVISIONS

Supplementing Bulletin BE 784 legend specified therein intended to apply only products manufactured by McKesson. Therefore, legend mentioned that bulletin should be changed to read "Fair Trade Agreement. Purchaser by accepting delivery of any commodity manufactured by McKesson & Robbins, Incorporated agrees not to resell such commodity, by direct or indirect

means at less than the prescribed net retail minimum price published by McKesson & Robbins, Incorporated. This agreement not applicable to sales in non-fair trade states or District of Columbia." Letter follows:

84 - EXHIBIT 4 TO SUPPLEMENTAL INTERROGATORIES

FOR ATTENTION OF CHIEF HOUSE EXECUTIVES

Number BE-786

Date June 8, 1951

Bridgeport Fair Trade Contract

We have just sent the following telegram to you:

"Supplementing Bulletin BE-784 legend specified therein intended to apply only products manufactured by McKesson. Therefore, legend mentioned that bulletin should be changed to read: 'Fair Trade Agreement. Purchaser by accepting delivery of any commodity manufactured by McKesson & Robbins, Incorporated agrees not to resell such commodity, by direct or indirect means at less than the prescribed net retail minimum price published by McKesson & Robbins, Incorporated. This agreement not applicable to sales in nonfair trade states or District of Columbia.' Bulletin follows."

When we sent you our Bulletin BE-784 of June 1st, we expected the contract statement would be limited to apply just to those manufacturers who required us to make fair trade contracts with our customers, the limitation being accomplished by a published notice or perhaps by a letter to our retail customers.

There is still a good possibility that an adequate means of notification of manufacturers covered can be devised other than incorporating their names in the contract legend.

But to clear up any possibility of confusion on the coverage of the contract statement, Bridgeport has decided to change the wording of the legend as above quoted.

So get another rubber stamp with the changed wording, but don't throw away the old one—we may have use for it.

Put the stamp on all invoices and on all warehouse copies regardless of whether or not the invoices or receipts contain Bridgeport items.

And don't sell any customer McKesson products who refuses to enter into a contract with us on those products.

The details of the Bridgeport Fair Trade Plan were only made known on Monday of this week. Yet in that short time an immense amount of favorable interest has developed in all sections of the trade. It is also encouraging to know that no one has found any basic flaws in the plan.

H. C. NOLEN.

FOR ATTENTION OF CHIEF HOUSE EXECUTIVES

Number BE-785

Date June 6, 1951

McKesson Products to Other Wholesalers

In support of Bridgeport's fair trade plan, none of our wholesale divisions will sell any McKesson labeled products to any wholesaler who has not entered into a fair trade contract with McKesson Laboratories.

Send Mr. Dewell at Bridgeport a list of wholesalers, showing name and address, to whom you sell McKesson products.

Bridgeport will then send a contract to each wholesaler on the list. The Laboratories will notify you when they receive the signed contract from the wholesaler.

Do not sell McKesson products to any other wholesaler until you have word from Bridgeport that they have signed a fair trade contract on those products.

H. C. NOLEN.

MCKESSON & ROBBINS,
INCORPORATED, LABORATORIES,
Bridgeport 9, Connecticut,

June 8, 1951.

In view of developments during the past few days, it is now clear that the unanimous sentiment of the drug industry is vigorously in favor of fair trade, and in this sentiment you no doubt concur.

You have in the past secured your McKesson manufactured products from one of our authorized distributors and in turn have supplied your retail accounts. So that you may continue this practice, we now ask that you sign the enclosed Fair Trade Contract between us, as the manufacturer, and you, as the distributor, covering the products which we manufacture.

Under the contract, you agree to sell products of our manufacture at not less than the stipulated fair trade minimum and further agree to enter into a fair trade contract covering our products with each of your customers to whom any of those products are sold.

The Fair Trade Law of your state provides that a manufacturer may obligate its distributors to require their customers to agree to observe the established minimum resale prices.

By placing the following legend on each of your invoices, it is

our opinion, concurred in by our legal counsel, that by the acceptance of the merchandise on that invoice each of your customers will have entered into a legal fair trade contract and will be bound to observe the published fair trade minimum.

FAIR TRADE AGREEMENT

Purchaser, by accepting delivery of any commodity manufactured by McKesson & Robbins, Incorporated, agrees not to resell such commodity, by direct or indirect means, at less than the prescribed net retail minimum price published by McKesson & Robbins, Incorporated. This agreement not applicable to sales in nonfair trade states or District of Columbia.

87 It is also our opinion that, as long as the legend is legible, it may appear on either the face or back of each invoice just like any other term of purchase and may be printed, typed, mimeographed, or stamped.

We as the manufacturer have previously posted with the Fair Trade Committee in each state having a fair trade statute a list of our minimum resale prices. Those minimum prices continue in effect.

This is our answer to our customers who ask what we are going to do in legal support of fair trade:

We are going to sell our products only to those who enter into a fair trade contract with us or our appointed distributors.

Please sign and return promptly one copy of the enclosed agreement retaining the other copy for your files.

Sincerely,

MCKESSON LABORATORIES,
W. E. DEWELL,

Vice President.

Enclosures.

88 MANUFACTURER-WHOLESALE FAIR TRADE AGREEMENT

Between the undersigned Seller, McKesson & Robbins Laboratories, and the undersigned Buyer.

In consideration of the sale to the Buyer of commodities which bear the trademark, brand, or name of the Seller and the promises by the Buyer, it is agreed:

1. The Buyer will not advertise, offer for sale, sell, or resell any of the Seller's commodities shown on Schedule A attached hereto at prices less than the Seller's published net wholesale prices.

2. The Buyer agrees that no price concession, directly or indirectly, will be made in the sale of said commodities in combination or otherwise except as herein provided.

3. Buyer agrees that it will require any purchaser to whom Buyer resells such commodities to agree that such purchaser and any subsequent purchasers will not, in turn, resell them at less than the net retail minimum prices published by Seller.

4. The Seller reserves the right to change said published prices and to add or eliminate commodities from the attached schedule at any time upon giving such reasonable notice thereof, either by publication or such other means as Seller may determine.

5. This agreement shall apply to each and every sale of the said commodities at the time and to the extent that this agreement is lawful under the Fair Trade Act of the state in which the sale is made.

In witness whereof the parties hereto have executed this agreement this 1st day of June 1951.

MCKESSON & ROBBINS LABORATORIES,
Fairfield, Connecticut.

By W. E. DEWELL, *Vice President.*

Buyer

Street

City and State
By -----
Title

89

EXHIBIT 7 TO SUPPLEMENTAL INTERROGATORIES

MCKESSON & ROBBINS, INCORPORATED,

LABORATORIES,

*Bridgeport 9, Connecticut,**June 8, 1951.*

In view of developments during the past few days, it is now clear that the unanimous sentiment of the small business man is vigorously in favor of fair trade.

When we wrote to you on June 1, the McKesson Laboratories was the first to announce an effective plan, following the recent Supreme Court case which was at first thought by some to be the death knell of fair trade.

You should take advantage of the opportunity afforded by our plan to promote sales of McKesson products, which now more than ever before will be welcomed by your retail customers.

When we gave you in our letter of June 1 a suggestion on a form of legend to be stamped on your invoices, we as a manufacturer were naturally thinking of our own products.

We now find that when the statement is used by wholesalers some confusion may arise as to the products covered by the legend.

It was our expectation and intention to require you to make a fair trade contract with your customers only on those goods on which we may lawfully contract with you, being just those goods of our own manufacture.

Therefore, to clear up any confusion that may arise we telegraphed you today recommending that the form of legend which we suggested be stamped on your invoices be changed to read:

90

FAIR-TRADE AGREEMENT

Purchaser, by accepting delivery of any commodity manufactured by McKesson & Robbins, Incorporated, agrees not to resell such commodity, by direct or indirect means, at less than the prescribed net retail minimum price published by McKesson & Robbins, Incorporated. This agreement not applicable to sales in nonfair trade states or District of Columbia.

The plan is effective because already we know that two outspoken price cutters have had to retract their proposed plans for price cutting on our items, because they could not lawfully cut the prices under McKesson Laboratories' fair trade plan, which will be binding on retailers in fair trade states.

We wish again to emphasize the opportunity which you now have to make sales of our merchandise based on the dealer gross profit, protected as it is by fair trade agreements.

Sincerely,

MCKESSON LABORATORIES,
W. E. DEWELL,

Vice President.

WED:M.

91

Affidavit of service by mail
(Omitted in printing)

92

In the United States District Court for the Southern
District of New York

*Answers of defendant, McKesson & Robbins, Incorporated, to
supplemental interrogatories propounded by the plaintiff*

Filed December 2, 1953

[File endorsement omitted.]

[Title omitted.]

The answers are furnished by Wilbur E. Dewell, Vice President and Manager of McKesson Laboratories, the Manufacturing Division of defendant, located at Bridgeport, Connecticut, which will hereinafter be referred to as the "Manufacturing Division." Mr. Dewell's address is Hill Farm Road, Fairfield, Connecticut. Unless otherwise specified, all answers relate to the period July 1,

1951, to June 30, 1952. The numbers of the answers correspond with the numbers of the supplemental interrogatories.

1. No.

2. By check. The checks were sent to the Home Office of the defendant for the reason that after the Manufacturing Division bills the wholesale drug divisions, the Manufacturing Division transfers the accounts receivable to the Home Office. The Manufacturing Division, of course, charges the Home Office for the amount of the receivables so transferred to the Home Office. Proceeding in this manner simplifies the necessity of sending multiple checks by the various divisions since there are other charges which the wholesale divisions have to pay to the Home Office. Bills are sent by the Manufacturing Division to the wholesale divisions but bills of sale are not customary in the drug industry.

3. Without consulting the wholesalers in question it is impossible to know the retailers from whom those wholesalers solicited orders during the period from July 1, 1951, to June 30, 1952. However, since those wholesalers had trading areas which overlapped in whole or in part the trading areas of various of the wholesale drug divisions of defendant it is believed that they would have solicited orders for drug products, including McKesson products, from many of the same retailers from whom wholesale drug divisions of defendant solicited orders.

4. No, although the method of making some McKesson products may have been covered by process or method patents.

5. The manufacturing division sold products pursuant to fair trade agreements of the type attached as Exhibit A to the plaintiff's first set of Interrogatories directly to the wholesalers listed in the annexes to Items 7 and 8 of the answers to the first set of interrogatories. In addition, the Manufacturing Division obtained fair trade contracts from the wholesalers in the states in question listed in Annex to Item 5 attached. The names of those wholesalers were obtained from various of the wholesale drug divisions of the defendant. See answer to supplemental interrogatory 14.

6. Yes; but only to the extent and during the periods permitted by the laws of those states. Defendant did no fair trading in Georgia following the decision of the Supreme Court of Georgia in *Grayson-Robinson Stores, Inc. v. Oneida Ltd.*

7. Exhibit 1 was sent on or about June 1, 1951 by the Manufacturing Division to each of the retail accounts to which the Manufacturing Division sold McKesson products in fair trade states.

8. Orders from the retailers referred to in answer to Interrogatory 7 above were solicited or received initially by the officers,

salesmen or other employees of the Manufacturing Division. Deliveries to said retailers were made directly from the Manufacturing Division, although it is possible that some of the retailers may have placed orders, especially in emergencies, with wholesalers including the wholesale divisions of defendant. Payments for McKesson products sold by the Manufacturing Division to retailers were made directly by those retailers to the Manufacturing Division. The "appointed distributors" mentioned in Exhibit 1 were the wholesale drug divisions of defendant and the wholesalers listed in Annexes 7 and 8 to the answers to the first set of interrogatories.

9. Exhibit 2 was sent on or about June 1, 1951 by the Manufacturing Division to each of its wholesale customers in fair trade states. The telegram was sent to such wholesalers a few days later.

10. Orders from the wholesalers referred to in the answer to Interrogatory 7 above were solicited or received initially by the officers, salesmen or other employees of the Manufacturing Division. Deliveries to said wholesalers were made directly from the Manufacturing Division, although it is possible that some of the wholesalers may have placed orders, especially in emergencies, with other wholesalers including the wholesale divisions of defendant. Payments for McKesson products sold by the Manufacturing Division to wholesalers were made directly by those wholesalers to the Manufacturing Division.

11. The "chief House Executives" referred to at the top of Exhibit 3 were division managers in charge of the wholesale drug divisions of defendant as set forth in the attached Annex to Item 11. None were executives of the Manufacturing Division.

12. Yes. H. C. Nolen was Vice President in charge of Drug Merchandising.

13. Yes.

14. Yes. Annex to Item 14 attached is a list of the wholesalers whose names were forwarded to the Manufacturing Division. Any orders for McKesson products received during the period in question from these wholesalers were received mainly by officers, salesmen and other employees of various of the wholesale drug divisions of the defendant, and deliveries were made and payments received by such wholesale drug divisions. Purchases by these wholesalers from the various wholesale drug divisions were insignificant and were principally of a courtesy nature to enable the wholesalers to fill demands they had for McKesson products.

15. Yes, by the Manufacturing Division to each of the wholesale customers listed in the Annex to Item 14.

16. The quoted statement is to the best of our knowledge a true statement of the past practice of those wholesalers to whom Ex-

hibit 6 was sent and the practice continued during the period from July 1, 1951 to June 30, 1952. The "authorized distributors"

referred to would include the wholesale divisions of defendant and also the wholesalers listed in the Annexes to Items 7 and 8 of defendant's answers to plaintiff's first set of Interrogatories. The wholesale drug divisions of defendant did not prepare and submit the form of fair trade agreement because the agreement was between such wholesalers and McKesson & Robbins Laboratories which is the Manufacturing Division. It was the Manufacturing Division which had the responsibility and function of handling the fair trading of its products rather than the responsibility of the wholesale drug divisions. It is the policy of defendant that its wholesale drug divisions should have nothing whatsoever to do with other wholesalers regarding the types of products to be sold or the prices at which products are to be sold. As a manufacturer, however, the Manufacturing Division does make use of the benefits available under the Miller-Tydings Act, the McGuire Act and the fair-trade laws of the fair trade states by fair trading the manufactured products of such Manufacturing Division in accordance with the provisions of those laws.

17. The wholesalers who executed the form of fair trade agreement attached to Exhibit 6 are set forth in Annex to Item 17 attached hereto. Any purchases of McKesson products by those wholesalers during the period in question would have been made principally from various of the wholesale drug divisions of the defendant, but the amounts of such purchases would have been insignificant for the reason mentioned in the answer to Interrogatory 14 above. None of these wholesalers had separate fair trade contracts with any of the wholesale drug divisions of defendant. Since, however, the manufacturer-wholesaler fair trade agreement of the type attached to Exhibit 6 applied to sales of McKesson products irrespective of whether or not the products would have been sold directly by the Manufacturing Division or by any other source, the purchasers of McKesson products who entered into said manufacturer-wholesaler fair trade agreements would have been bound thereby.

18. It is difficult to approximate the dollar volume of McKesson products sold by the wholesale drug divisions of the defendant to wholesalers. The volume is so insignificant as mentioned in the answer to Interrogatory 14 above that no attempt is made to keep separate records of such sales. It is believed that for any year, including the period July 1, 1951 to June 30, 1952, the aggregate sales by the wholesale drug divisions of defendant of McKesson products to other wholesalers would amount to about

\$200,000. It is unlikely that the wholesale drug divisions of defendant would have sold any McKesson products to any of the wholesalers listed in the Annex to Item 7 or the Annex to Item 8 of the defendant's answers to the plaintiff's first set of Interrogatories during the period in question, since those wholesalers purchased directly from the Manufacturing Division. It is, of course, always possible that in emergencies some of these wholesalers may have purchased occasional items from the wholesale drug divisions of defendant. All sales by the wholesale drug divisions of the defendant to other wholesalers of McKesson products would not have been made subject to fair trade agreements of the type attached as Exhibit A to the plaintiff's first set of Interrogatories. There probably were instances in which sales were made by the wholesale drug divisions of defendant to wholesalers who had not signed such a form of agreement. However, the Manufacturing Division did not to our knowledge make
 98 any sales of McKesson products to any wholesaler in a fair trade state who had not executed such a fair trade agreement.

19. Yes, but except for orders received from retailers to whom the Manufacturing Division sold directly the orders would have been turned over to wholesalers located in the territory where the officers or employees worked. Attached hereto as Annex to Item 19 is a list of the customers to whom the Manufacturing Division made direct retailer sales whose addresses are believed to be located in the probable trading areas of the wholesalers listed in Annex 8 to the answers to the first set of Interrogatories. Included in Annex to Item 19 is the dollar volume of sales of McKesson products made by the Manufacturing Division to such retailers during the period in question. Some of such retailers may have purchased McKesson products from the Manufacturing Division not only for resale in stores of such retailers located in the trading areas of the wholesalers listed in Annex 8 to the answers to the first set of Interrogatories, but also for resale in stores of such retailers located elsewhere. The details are not known to the defendant. The defendant has no knowledge as to whether any of the wholesalers in question also solicited orders for McKesson products from these retailers. Excluded from the list are retailers whose purchases aggregated less than \$50.

20. The answer is probably yes. See answer to Interrogatory 14 above.

21. Yes, by the Manufacturing Division to each of its wholesaler customers in fair trade states.

22. No. There was no occasion to believe that the wholesale drug divisions of defendant located in fair trade states would

not sell McKesson products at the fair trade prices set forth in the price lists prepared by the Manufacturing Division.

McKESSON & ROBBINS, INCORPORATED,

By R. J. Platt

R. J. PLATT, Assistant Secretary.

99 [Duly sworn to by jurat omitted in printing.]

114

ANNEX TO ITEM 17

Averbeck Drug Company, Youngstown, Ohio.

John B. Daniel, Incorporated, Atlanta, Georgia.

Cook, Everett & Pennell, 137 Middle Street, Portland 6, Maine.

Gilman Brothers, Incorporated, 100-12 Shawmut Avenue, Boston, Massachusetts.

J. E. Gould & Company, 201 Federal Street, Portland 1, Maine.

S. S. Pierce Company, 133 Brookline Avenue, Boston Massachusetts.

United Consumers, Incorporated, 120 Brookline Avenue, Brookline, Massachusetts.

Lawrence Wholesale Drug Company, 25 Water Street, Lawrence, Massachusetts.

Collier Drug Company, Birmingham, Alabama.

Southeastern Drug Company, Montgomery, Alabama.

Rader Drug Company, 341-39th Street, Brooklyn, New York.

Rogers Wholesalers, 119-20 Merrick Road, St. Albans, Long Island, New York.

Torbert Drug Company, Dubuque, Iowa.

Duff Brothers, Incorporated, Chattanooga, Tennessee.

115 Galler Drug Company, 651 South Wells, Chicago, Illinois.

Lag Drug Company, 4601 South Wentworth, Chicago, Illinois.

Reliable Drug Company, 110 West Hubbard, Chicago, Illinois.

Louis Zahn Drug Company, 800 South Kedzie, Chicago, Illinois.

Heyboer Drug Company, Grand Rapids, Michigan.

Cincinnati Economy Drug Company, 209 East Court Street, Cincinnati, Ohio.

Hale Justis Drug Company, 9 West Third Street, Cincinnati, Ohio.

Coastal Wholesale Drug Company, Myrtle Beach, South Carolina.

Davis Brothers Wholesale Drug, 1628 15th Street, Denver, Colorado.

C. D. Smith Drug Company, Grand Junction, Colorado.

Lambert & Lowman, Division of Ketchum Drug Company, Detroit, Michigan.

Monroe Wholesale Drug Company, Monroe, Louisiana.
 Standard Wholesale Drug Company, Meridian, Mississippi.
 Snowden Mize Drug Company, Atchison, Kansas.
 Brunswig Drug Company, 4701 Santa Fe Avenue, Los Angeles,
 California.

116 Los Angeles Drug, 1136 San Julian Street, Los Angeles,
 California.

Ellis-Bagwell Drug Company, 455 South Front Street,
 Memphis, Tennessee.

Hatton Drug Sundry Company, 1483 Northwest Seventh Ave-
 nue, Miami, Florida.

Gulf Drug Company, 50 Northwest 10th Street, Miami, Florida.

Jaynor Drug Sundry Company, 215 Northwest 24th Street,
 Miami 37, Florida.

Ely Levin Wholesale Distributors, 2085 Northwest Second Ave-
 nue, Miami 37, Florida.

Yahr Lange, Incorporated, 141 North Water Street, Milwaukee,
 Wisconsin.

F. Dohmen Company, 319 North Water Street, Milwaukee,
 Wisconsin.

Badger Wholesale Drug, 141 West Seeboth, Milwaukee, Wis-
 consin.

Northern Drug Company, Fargo, North Dakota.

Mobile Drug Company, Mobile, Alabama.

D. Kaltman & Company, Incorporated, 128 Webster Avenue,
 Jersey City, New Jersey.

D. Kaltman & Company, Incorporated, 117-139 North Delaware
 Avenue, Atlantic City, New Jersey.

Bergen Drug Company, 138-160 Johnson Avenue, Hackensack,
 New Jersey.

117 N. J. Wholesale Drug Company, 56 Arlington Street,
 Newark, New Jersey.

McMonagle & Rogers, 20-24 Union Street, Middletown, New
 York.

Apothecaries Hall Company, 28 Benedict Street, Waterbury,
 Connecticut.

D. A. Rosow & Company, 325 North Front Street, Hartford
 Connecticut.

Lee & Osgood, 340 Thames Street, Norwich, Connecticut.

Charles S. Leete & Company, 34 Crown Street, New Haven,
 Connecticut.

Atlantic Drug Company, 155 Union Avenue, New Haven, Con-
 necticut.

L. L. Lyons & Company, Limited, 800 Tchoupitoulas Street,
 New Orleans, Louisiana.

McKESSON & ROBBINS

HOME OFFICE
155 East 44th Street
NEW YORK 17, N. Y.

(Manufacturer's Name)

(Street Address)

(City)

(Postal Zone)

(Date)

WHOLESALE DRUG & SUNDRIES DIVISIONS

Abilene, Texas
1542 South Broadway

Albany, N. Y.
P. O. Box 579
230 E. Main St.

Albany, N. Y.
P. O. Box 101
445 Broadway

Anniston, Tex.
P. O. Box 2000
109-11 Fillmore St.

Augusta, Ga.
305 Jackson St.

Billings, Mont.
P. O. Box 2000
1029 Montana Ave.

Birmingham, Ala.
1706 First Ave.

Boston, Mass.
305 Summer St.

Brooklyn Division
Address
40-30 Metropolitan Ave.
Bayside Park 74, N. Y.

Buffalo, N. Y.
P. O. Box 412
100 Court St.

Burlington, Ia.
P. O. Box 100
100 North 4th St.

Calver, Ill.
P. O. Box 275
912 Commercial Ave.

Cedar Rapids, Ia.
P. O. Box 100
900 Second St., S.E.

Chattanooga, Tenn.
P. O. Box 1507
1032 Market St.

Chicago, Ill.
P. O. Box 12200
540 West Randolph St.

Cincinnati, O.
P. O. Box 477
225 East 6th St.

Cleveland, O.
P. O. Box 1239
1002 West 9th St.

Columbia, S. C.
P. O. Box 100
919 German St.

Columbus, Georgia
P. O. Box 100
1000 Second Ave.

Dallas, Tex.
P. O. Box 1000
610 North Field St.

Denver, Colo.
P. O. Box 1000
1054 Lawrence St.

Detroit, Mich.
P. O. Box 250
505 W. Jefferson Ave.

El Paso, Tex.
P. O. Box 100
420 West San Antonio St.

Fort Smith, Arkansas
105-101 Rogers Ave.

Fresno, Calif.
P. O. Box 1712
442 P St.

Honolulu, T. H.
P. O. Box 1000
720 South St.

Houston, Tex.
P. O. Box 1200
1022 Leeland Ave.

Huntington, W. Va.
P. O. Box 1000
700 Seventh St.

Jackson, Miss.
P. O. Box (V. Jackson) 1067
145 N. Gallatin St.

Jacksonville, Fla.
P. O. Drawer V, W. Bay St.
25 N. Market St.

Kansas City, Mo.
P. O. Box 57
112 Broadway

Little Rock, Ark.
P. O. Box 1000
102 N. Main St.

Los Angeles, Calif.
P. O. Box 1010, Van Arman
208 S. Los Angeles St.

Louisville, Ky.
724 West Main St.

Macon, Ga.
P. O. Box 100
440 Broadway

Memphis, Tenn.
109 S. 2nd St.

Miami, Fla.
P. O. Box
(Little River St.) 1057
745 N. E. 2nd Ave.

Millwaukee, Wis.
P. O. Box 674
433 E. Michigan St.

Minneapolis, Minn.
P. O. Box 100
24 North 1st St.

Mobile, Ala.
P. O. Box 1500
118 N. Royal St.

Nashville, Tenn.
P. O. Box 270
134 Second Ave. N.

Newark, N. J.
P. O. Box 100
750 Summer Ave.

New Haven, Conn.
P. O. Box 1000
112 Winchester Ave.

New Orleans, La.
P. O. Box 100
755 Magazine St.

New York 36, N. Y.
1671 Third Ave.

New York 17, N. Y.
Home Office
155 E. 44th St.

North Hollywood, Calif.
P. O. Box 512
10000 Van Owen St.

Oakland, Calif.
P. O. Box 1000
100 Castro St.

Ogden, U.
P. O. Box 750
160 24th St.

Oklahoma City, Okla.
P. O. Box 100
10 N. E. 10th St.

Omaha, Neb.
902 Farnam St.

Orlando, Fla.
P. O. Box 1000
120 W. Robinson Ave.

Peoria, Ill.
P. O. Box 100
112 S. Washington St.

Phoenix, Ariz.
P. O. Box 1000
1st and Jackson St.

Pittsburgh, Pa.
P. O. Box 1000
445 Water St.

Portland, Ore.
P. O. Box 1000
420 N. W. 10th Ave.

Providence, R. I.
P. O. Box 1000
204 Hartford Ave.

Reno, Nev.
P. O. Box 1000
165 W. Salem Ave.

Rochester, N. Y.
P. O. Box 100
230 St. Paul St.

Rock Island, Ill.
P. O. Box 611
100 Nineteenth St.

Sacramento, Calif.
P. O. Box 100
425 North 26th St.

Saint Louis, Mo.
120 South Broadway

Saint Paul, Minn.
225 East 6th St.

San Antonio, Tex.
P. O. Box 100
1110 Broadway Ave.

San Diego, Calif.
P. O. Box 1000
7th and J St.

San Francisco, Calif.
P. O. Box 1000
50 First St.

Seattle, Wash.
P. O. Box 1000
400 Occidental Ave.

Sioux City, Ia.
P. O. Box 1000
104 Pearl St.

Spokane, Wash.
P. O. Box 1000
160 S. Wall St.

Springfield, Mass.
P. O. Box 100
88 Birney Ave.

Syracuse, N. Y.
P. O. Box 1000
116 W. Willow St.


Tampa, Fla.
P. O. Box 1000
100 Tyler St.

Tulsa, Okla.
P. O. Box 1000
1000 S. Franklin

Victoria, B. C.
P. O. Box 100
107 N. Santa Fe Ave.

Waltham, N. Y.
P. O. Box 100
251 Hawthorne Ave.

Postal Zone numbers refer to post office box address and not location of building.

IMPORTANT: Be sure to put our Home Buying Office  155 East 44th Street, New York 17, N. Y. on your mailing list to receive all copies of material sent to the trade.

PRICE SUBJECT TO FAIR TRADE ACTS WHEREVER
LEGALLY PERMISSIBLE

REVISED OCTOBER 1, 1951

Please ship the McKESSON PRODUCTS indicated below.

To.....
Town..... State.....
Ship Via..... When.....
Order No..... Date..... Salesman.....

TERMS:





Line extensions of less than \$4 in original shipper indicated*..... 10% off list
Line extensions of \$4 or over..... 10% off list
\$25 through \$99 assorted..... 10% off list
\$100 through \$249 assorted..... 10% and 2 1/2 % off list
\$250 and over assorted..... 10% and 5% off list

All the above discounts extended for payment within discount period.

Merchandise: Be sure to CHECK Dealer's Stocks on all items listed below

INV.	PRODUCT				SHIP	BONUS	EXT.																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																</
------	---------	--	--	--	------	-------	------	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	----

INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.
Name Shipper-Shell-Retail-Full	Size Min. List				Name Shipper-Shell-Retail-Full	Size Min. List				Name Shipper-Shell-Retail-Full	Size Min. List				Name Shipper-Shell-Retail-Full	Size Min. List			
VITAMIN PRODUCTS					TOILET PREPARATIONS					WET PACKAGE LINE Suggested Retail Price					DRY PACKAGE LINE Suggested Retail Price				
Bezel Caps. (Vit. B Comp.) 40s 1 doz. 1.00 .98 7.80					Shavami (Br. Sh. Cr.) tubes 4 1/4 oz. 6 doz. .60 .53 3.60					Calamine Lq. (Phenola.) N.F. 4 oz. 2 doz. .29 .29 1.90					Acid, Boric, Gran. Cry. U.S.P. 1 lb. 1 doz. .69 .410				Pot. Permangan. Cry. U.S.P. 1 oz. 12 doz. 12 .25 1.60
Bezel Caps. (Vit. B Comp.) 100s 1 doz. 2.25 1.98 16.00					Shavami (Brushl. Sh. Cr.) Jar 8 1/2 oz. 1 doz. .75 .69 5.20					Camphor, (Spirit of) N.F. 1/2 oz. 12 doz. 12 .20 1.40					Acid, Boric, Powd. U.S.P. 1 oz. 12 doz. 12 .15 .95				Pot. Permangan. Cry. U.S.P. 2 oz. 12 doz. 12 .35 2.30
Bezel Caps. (Vit. B Comp.) 250s 1 doz. 4.50 4.23 34.00					Shaving Lotion 4 oz. 3 doz. .45 .45 3.10					Camphor, (Spirit of) N.F. 1 oz. 12 doz. 12 .35 2.40					Acid, Boric, Powd. U.S.P. 2 oz. 2 doz. .25 1.45				Psyllium Seed, N.F., Brown 1 lb. 1 doz. 1.29 9.40
Bezel Caps. (Vit. B Comp.) 500s 1 doz. 8.50 7.79 62.80					Soothe Skin Hand Cream 4 1/4 oz. 1 doz. .60 .59 4.40					Camphor, (Spirit of) N.F. 2 oz. 6 doz. 12 .60 4.20					Acid, Boric, Powd. U.S.P. 4 oz. 2 doz. .33 2.00				Psyllium Seed, N.F., Blonde 1 lb. 1 doz. .98 9.00
Bezel Multiple Caps. 50s 12 doz. 12 4.25 4.25 33.60					Soothe Skin Lotion 8 oz. 1 doz. .50 .49 3.40					Cascara Sag. (Arom. Ext. of) 2 oz. 6 doz. 12 .50 3.80					Acid, Boric, Powd. U.S.P. 8 oz. 1 doz. .49 3.00				Pumice, Powdered, N.F. 4 oz. 2 doz. .23 1.50
Bezel Multiple Caps. 100s 1 doz. 7.50 7.50 60.00					Talc. for Men tins 3 1/4 oz. 6 doz. 12 .25 .21 1.60					Cascara Sag. (Arom. Ext. of) 4 oz. 2 doz. .89 6.00					Acid, Boric, Powd. U.S.P. 1 lb. 1 doz. .69 4.15				Rochelle Salt, N.F. 1 oz. 12 doz. 12 .20 1.20
N Bezel Mult. Caps w/ B12 (Children's) 100s 6 doz. 12 2.79 2.79 19.50					Tawn Brushless Shave 3/4 oz. 12 doz. 12 .10 .10 .80					Chloroform Liniment, N.F. 2 oz. 6 doz. 12 .35 2.25					Acid, Oxalic, Technical 1 oz. 12 doz. 12 .25 1.50				Rochelle Salt, N.F. 2 oz. 2 doz. .30 2.10
Bezel Special Formula Caps. 40s 6 doz. 12 3.00 2.98 22.00					Tawn Brushless Shave 4 1/4 oz. 1 doz. .50 .49 3.50					Glycerin, U.S.P. 1 oz. 12 doz. 12 .30 2.00					Acid, Salicylic, U.S.P. 1 oz. 2 doz. .25 1.65				Rochelle Salt, N.F. 4 oz. 2 doz. .50 3.40
Bezel Special Formula Caps. 100s 1 doz. 3.95 5.95 42.00					Tawn Hair Dressing 1/2 oz. 12 doz. 12 .10 .10 .80					Glycerin, U.S.P. 2 oz. 6 doz. 12 .53 3.60					Alum, Ammonia, Powd. N.F. 2 oz. 2 doz. .15 1.00				Salt peter, N.F., Small Cry. 2 oz. 12 doz. 12 .18 1.25
Bezel Syrup (Vit. B Comp.) 4 oz. 1 doz. 1.00 .98 7.80					Tawn Hair Dressing 5 oz. 1 doz. .75 .75 5.00					Glycerin, U.S.P. 4 oz. 2 doz. .89 6.00					Alum, Ammonia, Powd. N.F. 4 oz. 2 doz. .25 1.40				Salt peter, N.F., Small Cry. 4 oz. 2 doz. .29 1.80
Cytamin Caps. (A.B.C.D.G.) 25s All Sizes Temporarily Withdrawn					Tawn Deodorant Cologne 1/2 oz. 12 doz. 12 .10 .10 .80					Glycerin & Rose Water 4 oz. 2 doz. .47 3.00					Alum, Ammonia, Powd. N.F. 1 lb. 1 doz. .45 3.00				Salt peter, N.F., Small Cry. 1 lb. 1 doz. .59 3.90
Hali. Li. Oil Pl. Caps. 5,000A 100s 12 doz. 12 1.25 1.19 9.00					Tawn Deodorant Cologne 5 oz. 1 doz. .75 .75 5.00					Glycerin & Rose Water 8 oz. 1 doz. .63 4.20					Borax, U.S.P. 4 oz. 2 doz. .17 1.20				Senna (Comp. P'd. of), N.F. 1 oz. 12 doz. 12 .15 1.00
Hali. Li. Oil, Pl. Caps. 5,000A 250s 6 doz. 12 2.35 2.29 18.00					Tawn Lather Shave 4 oz. 1 doz. .50 .49 3.50					Iodine (Strong) N.F. 1/2 oz. 12 doz. 12 .17 1.22					Borax, U.S.P. 8 oz. 2 doz. .27 1.80				Senna (Comp. P'd. of), N.F. 2 oz. 2 doz. .25 1.75
Oleo Vitamin Conc. A&D 6cc. 1 doz. .85 .79 6.00					Tawn Lotion 1/2 oz. 12 doz. 12 .10 .10 .80					Iodine (Strong) N.F. 1 oz. 12 doz. 12 .29 1.90					Borax, U.S.P. 1 lb. 1 doz. .45 2.75				Senna (Comp. P'd. of), N.F. 4 oz. 2 doz. .35 2.60
Phos-Cal Caps. w/Vitamin D 100s 1 doz. 1.00 .98 7.60					Tawn Lotion 5 oz. 1 doz. .75 .75 5.00					Iodine (Tinct.) U.S.P. 1/2 oz. 12 doz. 12 .17 1.22					Calomel, N.F. 1/4 oz. 24 doz. 12 .25 1.70				Senna Leaves, N.F. 1 oz. 6 doz. 12 .20 1.35
Phos-Cal w/Vitamin D 250s 1 doz. 2.00 1.98 15.00					Tawn Shaving Set No. 50 Discontinued					Iodine (Tinct.) U.S.P. 1 oz. 12 doz. 12 .29 1.90					Copperas, Technical 4 oz. 2 doz. .17 1.20				Sodium Bicarbonate, U.S.P. 4 oz. 2 doz. .15 1.00
Phos-Cal w/Vitamin D and Iron 100s 1 doz. 1.25 1.19 9.25					N Tawn Men's Set #51 (brushless) 1 doz. 1 1.00 1.00 7.90					Merc. (H.W.D.) 2% Aqu. Sol. 1/2 oz. 24 doz. 12 .15 1.10					Copper Sulfate, U.S.P. 3 oz. 2 doz. .25 1.60				Sodium Bicarbonate, U.S.P. 8 oz. 2 doz. .25 1.50
Phospho Vitamin B 8 oz. 1 doz. 1.10 .98 7.20					N Tawn Men's Set #52 (lather) 1 doz. 1 1.00 1.00 7.90					Merc. (H.W.D.) 2% Aqu. Sol. 1 oz. 12 doz. 12 .25 1.75					Cream of Tartar, U.S.P. 1 oz. 12 doz. 12 .20 1.40				Sodium Bicarbonate, U.S.P. 1 lb. 1 doz. .35 2.15
Phospho Vitamin B 1 pt. 1 doz. 2.00 1.69 12.80					Tawn Men's Set No. 110 Discontinued					Oil, Camphorated, U.S.P. 1 oz. 12 doz. 12 .20 1.20					Cream of Tartar, U.S.P. 2 oz. 2 doz. .35 2.40				Sodium Fluoride 8 oz. 2 doz. .40 2.70
Phospho Vitamin B gals. Discontinued					Tawn Men's Set No. 200 1/2 doz. 1 2.00 2.00 14.80					Oil, Camphorated, U.S.P. 2 oz. 6 doz. 12 .30 2.00					Cream of Tartar, U.S.P. 4 oz. 1 doz. .65 4.40				Sodium Fluoride 1 lb. 2 doz. .65 4.20
Supermak (11 1/2 oz.) 1 lb. 1 doz. 1.25 1.25 9.60					Tawn Shampoo 1/2 oz. 12 doz. 12 .10 .10 .80					Oil, Camphorated, U.S.P. 4 oz. 2 doz. .50 3.30					Epsom Salt, U.S.P. 4 oz. 2 doz. .15 1.00				Sulfur (Flowers of), N.F. 4 oz. 2 doz. .23 1.50
Thiamine Hydro. Tabs. 5 mg. 100s 2 doz. 1.50 1.09 8.40					Tawn Shampoo 5 oz. 1 doz. .50 .49 3.50					C Oil, Castor, U.S.P. 1 oz. 12 doz. 12 .22 1.50					Epsom Salt, U.S.P. 8 oz. 2 doz. .25 1.60				Sulfur (Flowers of), N.F. 8 oz. 1 doz. .35 2.20
Thiamine Hydro. Tabs. 10 mg. 100s 2 doz. 2.50 1.69 13.20					Tawn Shaver's Special 1 doz. 1 1.00 1.00 7.90					C Oil, Castor, U.S.P. 2 oz. 6 doz. 12 .35 2.35					Epsom Salt, U.S.P. 1 lb. 1 doz. .37 2.25				Sulfur (Flowers of), N.F. 1 lb. 1 doz. .53 3.30
Thiamine Hydro. Tabs. 25 mg. 100s 2 doz. 3.00 2.69 18.00					Tawn Shaving Bowl 6 doz. 12 .10 .10 7.80					C Oil, Castor, U.S.P. 3 oz. 2 doz. .47 3.00					Flaxseed Meal, N.F. 2 oz. 2 doz. .20 1.30				Turmeric, Powdered 1 oz. 12 doz. 12 .20 1.40
Thiamine Hydro. Tabs. 50 mg. 100s 2 doz. 5.00 4.69 33.00					Tawn Shaving Soap (Refill) 6 doz. 12 .50 .50 3.50					C Oil, Castor, U.S.P. 4 oz. 2 doz. .60 3.90					Flaxseed Meal, N.F. 4 oz. 2 doz. .30 2.10				Wax Compound 1 lb. 1 doz. 12 .69 4.65
Thiamine Hydro. Tabs. 100 mg. 100s 2 doz. 9.00 8.49 60.00					Tawn Talc 1/4 oz. 12 doz. 12 .10 .10 .80					C Oil, Castor, U.S.P. 8 oz. 2 doz. 1.15 7.65					Flaxseed Meal, N.F. 8 oz. 1 doz. .50 3.40				
Vita. "A" Cap. 25,000 U.S.P.U. 30s 1 doz. 1.30 1.23 10.00					Tawn Talc 4 oz. 1 doz. .50 .49 3.50					C Oil, Castor, U.S.P. 1 pt. 1 doz. 2.07 13.80					Flaxseed Meal, N.F. 1 lb. 1 doz. .75 5.40				
Vita. "A" Cap. 25,000 U.S.P.U. 100s 6 doz. 12 4.00 3.69 31.00					Tawn Men's Travel Kit #105 1/2 doz. 1 2.79 2.79 23.40					C Oil, Citronella, Ceylon 1 oz. 12 doz. 12 .45 3.00					Flaxseed Whole, N.F. 2 oz. 2 doz. .20 1.30				
Vita. "D" Cap. 50,000 U.S.P.U. 100s 6 doz. 12 3.00 2.39 17.10					N Tawn Deluxe Travel Kit #106 1/2 doz. 1 5.89 5.89 48.00					C Oil, Coconut 2 oz. 6 doz. 12 .30 2.00					Flaxseed Whole, N.F. 4 oz. 2 doz. .30 2.10				
Wheat Germ Oil Caps. 50s 2 doz. .75 .69 5.00					Tawn Ladies Travel Kit 1/2 doz. 1 4.89 4.89 3.33 ea.					C Oil, Eucalyptus N.F. 1 oz. 12 doz. 12 .30 2.25					Flaxseed Whole, N.F. 8 oz. 2 doz. .50 3.40				
Wheat Germ Oil Caps. 100s 1 doz. 1.50 1.17 9.00					Theatrical Cold Cream 1 lb. 1 doz. .85 .79 7.00					C Oil, Eucalyptus N.F. 2 oz. 6 doz. 12 .50 3.80					Flaxseed Whole, N.F. 1 lb. 1 doz. .75 5.40				
Yeast Tablets (Brewers) 250s 2 doz. .75 .69 5.50					Violet Borated Talcum cans 13 oz. 3 doz. .6 .45 .45 3.30					C Oil, Wintergreen, Syn. U.S.P. 1 oz. 12 doz. 12 .25 1.60					Fuller's Earth 2 oz. 2 doz. .15 1.10				
TOILET PREPARATIONS					Witch Hazel, N.F. Dist. Ext. 4 oz. 2 doz. .25 .25 1.40					C Oil, Wintergreen, Syn. U.S.P. 2 oz. 6 doz. 12 .45 2.70					Fuller's Earth 4 oz. 2 doz. .25 1.50				
Bay Rum, West Indies 4 oz. 3 doz. .35 .35 2.20					Witch Hazel, N.F. Dist. Ext. 8 oz. 1 doz. .40 .35 2.25					Paregoric U.S.P. (Nar. req.) 1/2 oz. 12 doz. 12 .20 1.25					Henna Leaves, Powdered 1 oz. 2 doz. .20 1.30				
Bay Rum, West Indies 8 oz. 2 doz. .60 .55 3.90					Witch Hazel, N.F. Dist. Ext. 1 pt. 1 doz. .60 .53 3.80					Paregoric U.S.P. (Nar. req.) 1 oz. 12 doz. 12 .30 2.00					Henna Leaves, Powdered 4 oz. 2 doz. .50 3.30				
Bay Rum, Domestic 4 oz. 3 doz. .30 .29 1.90					Yodora jar 1/4 oz. 2 doz. .35 .33 2.60					Peppermint, (Ess. of) U.S.P. 1/2 oz. 12 doz. 12 .30 2.00					Henna Leaves, Whole 1 oz. 1 doz. .20 1.40				
Bay Rum, Domestic 8 oz. 2 doz. .50 .45 2.80					Yodora tubes 1/8 oz. 6 doz. 12 .35 .33 2.80					Peppermint, (Ess. of) U.S.P. 1 oz. 12 doz. 12 .45 3.30					Milk Sugar, U.S.P. 1 lb. 1 doz. .98 7.60				
Bay Rum, Domestic 1 pt. 1 doz. .60 .57 3.60					Yodora jar 2 oz. 2 doz. .60 .59 5.20					Turpentine (Rect. Oil of) N.F. 2 oz. 6 doz. 12 .20 1.25					Mustard, Powdered, N.F. 2 oz. 2 doz. .20 1.20				
Brace 4 oz. Temporarily Withdrawn					Yodora Deodorant Powder 4 oz. 4 doz. 12 .50 .49 4.00					Turpentine (Rect. Oil of) N.F. 4 oz. 2 doz. .30 1.90					Mustard, Powdered, N.F. 4 oz. 2 doz. .30 1.80				
Brace 8 oz. Temporarily Withdrawn					WET PACKAGE LINE Suggested Retail Price					DRY PACKAGE LINE Suggested Retail Price					Mustard, Powdered, N.F. 8 oz. 1 doz. .40 2.80				
Hairtone Rose Hair Oil 4 oz. 3 doz. .35 .33 2.20					Ammon., (Arom. Sp. of) U.S.P. 1 oz. 12 doz. 12 .25 1.80					Acid, Boric, Gran. Cry. U.S.P. 1 oz. 12 doz. 12 .15 .95					Mustard, Powdered, N.F. 1 lb. 1 doz. .65 4.60				
Hairtone Rose Hair Oil 8 oz. 2 doz. .60 .53 3.40					Ammon., (Arom. Sp. of) U.S.P. 2 oz. 6 doz. 12 .45 3.30					Acid, Boric, Gran. Cry. U.S.P. 2 oz. 2 doz. .25 1.45					Orris Root, Powdered, N.F. 1 oz. 12 doz. 12 .25 1.70				
Lanolin tubes 1 oz. 12 doz. 12 .30 .29 2.00					Arnica, (Tincture of) N.F. 1 oz. 12 doz. 12 .45 3.30					Acid, Boric, Gran. Cry. U.S.P. 4 oz. 2 doz. .33 2.00					Plaster of Paris 8 oz. 2 doz. .25 1.70				
Magnesia Tooth Paste Discontinued					Benzoin, (Comp. Tinc. of) U.S.P. 1 oz. 12 doz. 12 .35 2.60					Acid, Boric, Gran. Cry. U.S.P. 8 oz. 2 doz. .49 3.00					Plaster of Paris 1 lb. 1 doz. .35 2.30				

 Denotes Items Discontinued
 Denotes Items Temporarily Withdrawn
 Denotes Price Changes
 Denotes New Items

REVISED OCTOBER 1, 1951

Launch Riser: Be sure to CHECK Dealer's Stocks on all items listed below.

HEALTH HELPS AND SPECIALTIES

INV.	PRODUCT	SHIP	BONUS	EXT.
	Name Size Shopper Shelf Retail-Full Min. List			
	HEALTH HELPS AND SPECIALTIES			
	Analax 66 Temporarily Withdrawn			
	Analax 25s Temporarily Withdrawn			
	Analgesic Balm tubes 1/2 oz. 12 doz. 12 .30 .29 1.90	✓		
	Analgesic Balm 1 oz. 12 doz. 12 .60 .55 3.80	✓		
	A-200 Pyratine Liquid 2 oz. 6 doz. 12 .79 .79 3.80	✓		
	Aqua Drin 1 oz. 6 doz. 12 .60 .49 3.40	✓		
	Aspirin Tablets U.S.P. 12's 60 doz. 12 .10 .10 .72	✓		
	Aspirin Tablets U.S.P. 36's 6 doz. 12 .25 .25 1.80	✓		
	Aspirin Tablets U.S.P. Bots 100s 12 doz. 12 .50 .47 3.40	✓		
	Aspirin Tablets U.S.P. 1000s 1 doz. .Disp Disp. 14.40	✓		
	Axar Tablets 12s 36 doz. 12 .25 .25 1.35	✓		
	Axar Tablets 50s 12 doz. 12 .60 .59 3.60	✓		
	Axar Tablets No. 4 offer 1 doz. 1 .25 .25 4.73 ea.	✓		
	N Axon (Antihistamine) Caps. 40s 12 doz. 12 1.25 1.25 8.00	X		
	Beef, Iron & Wine 1 pt. 1 doz. 1.35 1.35 9.60	✓		
	Burntongue tubes 3 oz. 6 doz. 6 .60 .59 4.00	✓		
	Burntongue jar, 1 lb. 1 doz. 2.00 1.89 1.20 ea.	✓		
	Calx Cream tubes 3 oz. 6 doz. 12 .60 .59 4.20	✓		
	Calox Antiseptic 4 oz. 2 doz. 25 .25 1.80	✓		
	Calox Antiseptic 1 pt. 1 doz. .75 .73 4.80	✓		
	Calox Tooth Powder 1/4 oz. 6 doz. 12 .10 .10 .85	✓		
	Calox Tooth Powder 2 oz. 4 doz. 12 .35 .33 2.60	✓		
	Calox Tooth Powder 4 oz. 3 doz. 6 .50 .43 4.00	✓		
	Calox Tooth Powder 8 oz. 1 doz. 1.00 .79 7.20	✓		
	Camphor Ic tubes 1 oz. 12 doz. 12 .15 .15 1.10	✓		
	Castor Oil, Aromatic, N.F. 3 oz. 2 doz. .45 .45 2.80	✓		
	Citrated Carbonates Eff. 4 oz. 1 doz. .75 .69 4.80	✓		
	Citrated Carbonates Eff. 8 oz. 1 doz. 1.00 1.00 7.40	✓		
	Cod Liver Oil, U.S.P. 8 oz. 1 doz. .85 .79 6.00	✓		
	Cod Liver Oil, U.S.P. 1 pt. 1 doz. 1.35 1.29 10.00	✓		
	Cod Liver Oil, U.S.P. 1 qt. 1 doz. 2.25 2.19 17.50	✓		
	Cod Liver Oil, U.S.P. (H.P.) 4 oz. 1 doz. .65 .63 4.75	✓		
	Cod Liver Oil, U.S.P. (H.P.) 1 pt. 1 doz. 1.75 1.59 12.50	✓		
	Cod Liver Oil, U.S.P., Mint 8 oz. 1 doz. .85 .79 6.00	✓		
	Cod Liver Oil, U.S.P., Mint 1 pt. 1 doz. 1.35 1.29 10.00	✓		
	Cod Liver Oil, U.S.P., Mint 1 qt. 1 doz. 2.25 2.19 17.50	✓		
	Cold Sore Lotion 1/4 oz. 12 doz. 12 .25 .25 1.70	✓		
	Copper Iron Comp. 8 oz. 1 doz. 1.25 1.25 9.00	✓		
	Copper Iron Comp. Tabs 50s 12 doz. 12 1.00 1.00 8.00	✓		
	Corax (for Colds) 30s 24 doz. 12 .25 .25 1.60	✓		
	Corn Remedy 1/2 oz. 12 doz. 12 .35 .35 2.30	✓		
	Darol Cold Capsules 20s 12 doz. 12 .49 .49 3.00	✓		
	Darol Syrup for Coughs 8 oz. 1 doz. .75 .75 4.50	✓		
	Flaxr Catnip & Fennel N.F. 3 oz. 2 doz. .45 .45 2.80	✓		

PRODUCT				SHIP	BONUS	EXT.	REV.
Name	Size	Min.	List				
Shopper-Shelf-Retail-Full							
HEALTH HELPS AND SPECIALTIES							
Oint., Blue, 10% 1/2 oz.			1.50				
12 doz. 12	.20	.20					
Oint., Blue, 10% 1 oz.			2.50				
12 doz. 12	.35	.35					
Oint., Boric Acid, U.S.P. 1 oz.			1.60				
12 doz. 12	.25	.25					
Oint., C.L.O. w/ ZnO & Phenol 1 1/2 oz.			3.40				
12 doz. 12	.50	.50					
Oint., Ichthammol 10% N.F. 1 oz.			2.40				
12 doz. 12	.35	.35					
Oint., Phenol (Carbolic Acid) 1 oz.			1.60				
12 doz. 12	.25	.25					
Oint. Rectal 1 oz.			3.30				
12 doz. 12	.50	.50					
Oint. Zinc, U.S.P. 1 oz.			1.50				
12 doz. 12	.25	.25					
Oint. Zinc, U.S.P. 2 1/2 oz.			2.60				
6 doz. 6	.40	.39					
Olive Oil, U.S.P.			2 oz.				
Prices on Request			4 oz.				
Olive Oil, U.S.P.			8 oz.				
Prices on Request			1 pt.				
Olive Oil, U.S.P.			1 qt.				
Prices on Request			1 gal.				
Ora (Denture Cleaner) 2 1/4 oz.			2.40				
2 doz.	.30	.28					
Ora (Denture Cleaner) 6 1/2 oz.			4.80				
2 doz.	.60	.57					
Ora-Fix (Denture Adhesive) 3/4 oz.			2.50				
12 doz. 12	.35	.29					
Ora-Fix (Denture Adhesive) 1 1/2 oz.			4.60				
12 doz. 12	.60	.53					
Ora-Fix Pocket Pack			8.00				
6 doz. 6	1.00	1.00					
Pills, Bland's N.F. 100s			3.40				
12 doz. 12	.50	.45					
Pills, Vegetable Cathartic N.F. 50s			3.40				
12 doz. 12	.50	.49					
Pills, Hinkle's Comp. w/o Stry. 100s			4.00				
12 doz. 12	.60	.59					
Pinotol 4 oz.			2.40				
2 doz.	.35	.35					
Pinotol 1 pt.			6.60				
1 doz.	1.00	.95					
Pinotol gal.			3.40				
1 only	4.75	4.75					
Poison Ivy Lotion - 2 oz.			1.50				
6 doz. 12	.25	.25					
Poison Ivy Lotion - 5 oz.			3.00				
2 doz.	.50	.50					
Positos 12s (New Formula)			8.40				
6 doz. 12	1.25	1.25					
Positos Rectal Ointment 1 oz.			8.40				
12 doz. 12	1.25	1.25					
Profex tubes 4 gram			1.86				
12 doz. 12	.35	.35					
Pursin 10 oz.			8.00				
1 doz.	1.00	1.00					
Pursin 10 oz.			2.75				
3 bottles							
Pursin 10 oz.			5.00				
6 bottles							
Pursin Laxative Tab. 35s			2.00				
6 doz. 12	.25	.25					

Name	Size	Shipper	Shelf	Retail	Full	Net	Net
HEALTH HELPS AND SPECIALTIES.							
Soretone	1 pt.						
1 doz.	2.25	1.98	18.00				
Soretone	gal.						
1 only			10.00	eo.			
Suppositories, Glyc.	Adults	12s					
6 doz.	12	.40	.39	2.80			
Suppositories, Glyc.	Infants	12s					
6 doz.	12	.40	.39	2.80			
Surin Ointment	1 1/2 oz.						
4 doz.	12	1.25	1.25	9.00			
Surin Ointment	6 oz.						
1 doz.	2.98	2.98	22.00				
Surin Ointment	1 lb.						
1 doz.	Dap.	Dap.	3.80				
Syrup (Baby) Cough	3 oz.						
2 doz.	.35	.35	2.30				
Syrup, Figs and Senna	6 oz.						
2 doz.	.50	.50	3.50				
Syrup, Cough, W/h. Pine, w/ Tar	Sm.						
2 doz.	.35	.33	2.00				
Syrup, Cough, W/h. Pine, w/ Tar	Lg.						
2 doz.	.60	.57	3.80				
Syr., Cough, W.P., w/ Tar & Men.	Sm.						
2 doz.	.35	.33	2.00				
Syr., Cough, W.P., w/ Tar & Men.	Lg.						
2 doz.	.60	.57	3.80				
Syr., Cough, W.P., w/ Hon. & Euc.	Sm.						
2 doz.	.35	.33	2.00				
Syr., Cough, W.P., w/ Hon. & Euc.	Lg.						
2 doz.	.60	.57	3.80				
Syr., Cough, White Pine, plain	Sm.						
2 doz.	.35	.33	2.00				
Syr., Cough, White Pine, plain	Lg.						
2 doz.	.60	.57	3.80				
Tab., Ext. Cas. Sag.	5 Gr. c.c.	100s					
12 doz. 12	.65	.59	4.40				
Tab., Hinkle's Comp.	w/o Strych.	50s					
6 doz. 12	.25	.25	1.75				
Tab., Hinkle's Comp.	w/o Strych.	100s					
12 doz. 12	.50	.49	3.30				
Tab., Rhinitis w/ Quinine	1/2 St.	100s					
12 doz. 12	.50	.50	3.10				
Tab., Rhinitis w/ Quinine	F.S.	100s					
12 doz. 12	.69	.69	4.40				
Tablets, Soda Mint	1/2s						
12 doz. 12	.15	.15	1.00				
Talkies	24s						
12 doz. 12	.15	.15	1.15				
Tartan (Suntan Lotion)	1 1/4 oz.						
1 doz.	.40	.39	3.20				
Tartan (Suntan Lotion)	4 oz.						
3 doz.	.80	.79	6.40				
Tartan Lip Pomade							
24 doz. 12	.35	.35	2.80				
Throat Gargle	2 oz.						
6 doz. 12	.30	.29	1.80				
Throat Gargle	6 oz.						
2 doz.	.60	.55	3.60				
Toothache Drops w/ Appl.	1/4 oz.						
6 doz. 12	.35	.35	2.40				
Utol Skin Ointment	1 oz.						
12 doz. 12	1.00	1.00	7.20				
V. A. Douche Powder	4 oz.						
2 doz.	.60	.60	4.40				
V. A. Douche Powd. Packettes	12s						
1 doz.	.50	.49	3.80				
V. A. Douche Powd. Packettes	32s						
3 doz. 6	1.00	1.00	7.60				
Zinc Stearate, U.S.P.	1 oz.						
1 doz.	.35	.33	2.40				
C. S. Z. 1 oz.							
1 doz.	.50	.47	3.30				
C. S. Z. w/ Bal. Peru, 5%	1 oz.						
1 doz.	.75	.75	4.80				
VITAMIN PRODUCTS							
Ascorbic Acid Tab.	25 mg.	100s					
1 doz.	.85	.79	5.60				
Ascorbic Acid Tab.	50 mg.	100s					
2 doz.	1.25	1.19	8.60				
Ascorbic Acid Tab.	100 mg.	100s					
2 doz.	2.00	1.89	13.80				
Ascorbic Acid Tab.	250 mg.	100s					
2 doz.	4.00	3.75	27.00				
Bax Capsules	100s						
12 doz. 12	2.90	2.89	23.20				
Bax Capsules	250s						
1 doz.	6.00	5.98	47.30				

INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.	INV.	PRODUCT	SHIP	BONUS	EXT.					
Name	Size				Name	Size				Name	Size				Name	Size								
Shipper	Shelf	Retail	Full	Min.	List	Shipper	Shelf	Retail	Full	Min.	List	Shipper	Shelf	Retail	Full	Min.	List	Shipper	Shelf	Retail	Full	Min.	List	
VITAMIN PRODUCTS					TOILET PREPARATIONS					WET PACKAGE LINE					WET PACKAGE LINE					WET PACKAGE LINE				
Suggested Retail Price					Suggested Retail Price					Suggested Retail Price					Suggested Retail Price					Suggested Retail Price				
Bezel Caps. (Vit. B. Comp.)	40s	✓				Shavani (Br. Sh. Cr.) tubes	4 1/2 oz.	✓				Calamine Lo. (Phcnola) N.F.	4 oz.	✓				Acid, Boric, Gran. Crs. U.S.P.	1 lb.	✓				
1 doz.	1.00	.98	7.80		6 doz.	6	.60	.53	3.60		2 doz.	.29						1 doz.	.69	4.10				
Bezel Caps. (Vit. B. Comp.)	100s	✓				Shavani (Brushl. Sh. Cr.) jar	8 1/2 oz.	✓			Camphor, (Spirit of) N.F.	1/2 oz.	✓					Acid, Boric, Powd. U.S.P.	1 oz.	✓				
1 doz.	2.25	1.98	16.00		1 doz.	.75	.69	5.20		12 doz.	12	.20						12 doz.	12	.15	.95			
Bezel Caps. (Vit. B. Comp.)	250s	✓				Shaving Edition	4 oz.	✓			Camphor, (Spirit of) N.F.	1 oz.	✓					Acid, Boric, Powd. U.S.P.	2 oz.	✓				
1 doz.	4.50	4.23	34.00		3 doz.	.45	.45	3.10		12 doz.	12	.35						2 doz.	.25	1.45				
Bezel Caps. (Vit. B. Comp.)	500s	✓				Soothe Skin Hand Cream	4 1/2 oz.	✓			Camphor, (Spirit of) N.F.	2 oz.	✓					Acid, Boric, Powd. U.S.P.	4 oz.	✓				
1 doz.	8.50	7.79	62.80		1 doz.	.60	.59	4.40		6 doz.	6	.60						2 doz.	.33	2.00				
Bezel Multiple Caps.	50s	✓				Soothe Skin Lotion	8 oz.	✓			Cascara Sag. (Arom. Ext. of)	2 oz.	✓					Acid, Boric, Powd. U.S.P.	8 oz.	✓				
12 doz.	12	4.25	4.25	33.60		1 doz.	.50	.49	3.40		6 doz.	12	.50					1 doz.	.49	3.00				
Bezel Multiple Caps.	100s	✓				Talc. for Men time	3 1/4 oz.	✓			Cascara Sag. (Arom. Ext. of)	4 oz.	✓					Acid, Boric, Powd. U.S.P.	1 lb.	✓				
1 doz.	7.50	7.50	60.00		6 doz.	12	.25	.21	1.60		2 doz.	.89						1 doz.	.69	4.15				
N Bezel Mult. Caps w/ B12 (Children's)	100s	✓				Tawn Brushless Shave	1/4 oz.	✓			Chloroform Liniment, N.F.	2 oz.	✓					Acid, Oxalic, Technical	1 oz.	✓				
6 doz.	12	2.79	2.79	19.50		12 doz.	12	.10	.10	.80	6 doz.	12	.35					12 doz.	12	.25	1.50			
Bezel Special Formula Caps.	40s	✓				Tawn Brushless Shave	4 1/4 oz.	✓			Glycerin, U.S.P.	1 oz.	✓					Acid, Salicylic, U.S.P.	1 oz.	✓				
6 doz.	12	3.00	2.98	22.00		1 doz.	.50	.49	3.50		12 doz.	12	.30					2 doz.	.25	1.65				
Bezel Special Formula Caps.	100s	✓				Tawn Hair Dressing	1/2 oz.	✓			Glycerin, U.S.P.	2 oz.	✓					Alur, Ammonia, Powd. N.F.	2 oz.	✓				
1 doz.	5.95	5.95	42.00		12 doz.	12	.10	.10	.80		6 doz.	12	.53					2 doz.	.15	1.00				
Bezel Syrup (Vit. B. Comp.)	4 oz.	✓				Tawn Hair Dressing	5 oz.	✓			Glycerin, U.S.P.	4 oz.	✓					Alum, Ammonia, Powd. N.F.	4 oz.	✓				
1 doz.	1.00	.98	7.80		1 doz.	.75	.75	5.00			2 doz.	.89						2 doz.	.25	1.40				
Cytamin Caps. (A.B.C.D.G.)	25s	✓				Tawn Deodorant Cologne	1/2 oz.	✓			Glycerin & Rose Water	4 oz.	✓					Alum, Ammonia, Powd. N.F.	1 lb.	✓				
All Sizes Temporarily Withdrawn						12 doz.	12	.10	.10	.80	2 doz.	.47						1 doz.	.45	3.00				
Half Li. Oil Pl. Caps. 5,000A	100s	✓				Tawn Deodorant Cologne	5 oz.	✓			Glycerin & Rose Water	8 oz.	✓					Borax, U.S.P.	4 oz.	✓				
12 doz.	12	1.25	1.19	9.00		1 doz.	.75	.75	5.00		1 doz.	.63						2 doz.	.17	1.20				
Half Li. Oil, Pl. Caps. 5,000A	250s	✓				Tawn Lather Shave	4 oz.	✓			Iodine (Strong) N.F.	1/2 oz.	✓					Borax, U.S.P.	8 oz.	✓				
6 doz.	12	2.35	2.29	18.00		1 doz.	.50	.49	3.50		12 doz.	12	.17					2 doz.	.27	1.80				
Oleo Vitamin Conc. A&D	6cc	✓				Tawn Lotion 1/2 oz.	✓				Iodine (Strong) N.F.	1 oz.	✓					Borax, U.S.P.	1 lb.	✓				
1 doz.	.85	.79	6.00		12 doz.	12	.10	.10	.80		12 doz.	12	.29					1 doz.	.45	2.75				
Phos-Cal Caps. w/Vitamin D	100s	✓				Tawn Lotion 5 oz.	✓				Iodine (Tinct.) U.S.P.	1/2 oz.	✓					Calomel, N.F.	1/4 oz.	✓				
1 doz.	1.00	.98	7.60		1 doz.	.75	.75	5.00			12 doz.	12	.17					24 doz.	12	.25	1.70			
Phos-Cal w/Vitamin D	250s	✓				Tawn Shaving Set No. 50	✓				Iodine (Tinct.) U.S.P.	1 oz.	✓					Copperas, Technical	4 oz.	✓				
1 doz.	2.00	1.98	15.00		Discontinued						12 doz.	12	.29					2 doz.	.17	1.20				
Phos-Cal w/Vitamin D and Iron	100s	✓				N Tawn Men's Set #51 (brushless)	✓				Merc. (H.W.D.) 2% Aque. Sol.	1/2 oz.	✓					Copper Sulfate, U.S.P.	3 oz.	✓				
1 doz.	1.25	1.19	9.25		1 doz.	1	.00	1.00	7.90		24 doz.	12	.15					2 doz.	.25	1.60				
Phospho Vitamin B	8 oz.	✓				N Tawn Men's Set #52 (lather)	✓				Merc. (H.W.D.) 2% Aque. Sol.	1 oz.	✓					Cream of Tartar, U.S.P.	1 oz.	✓				
1 doz.	1.10	.98	7.20		1 doz.	1	1.00	1.00	7.90		12 doz.	12	.25					12 doz.	12	.20	1.40			
Phospho Vitamin B	1 pt.	✓				Tawn Men's Set No. 110	✓				Oil, Camphorated, U.S.P.	1 oz.	✓					Cream of Tartar, U.S.P.	2 oz.	✓				
1 doz.	2.00	1.69	12.80		Discontinued						12 doz.	12	.20					2 doz.	.33	2.40				
Phospho Vitamin B gals.	✓					Tawn Men's Set No. 200	✓				Oil, Camphorated, U.S.P.	2 oz.	✓					Cream of Tartar, U.S.P.	4 oz.	✓				
Discontinued						1/2 doz.	1	2.00	2.00	14.80		6 doz.	12	.30					1 doz.	.65	4.40			
Supermalt (11fl. oz.)	1 lb.	✓				Tawn Shampoo 1/2 oz.	✓				Oil, Camphorated, U.S.P.	4 oz.	✓					Epsom Salt, U.S.P.	4 oz.	✓				
1 doz.	1.25	1.25	9.60		12 doz.	12	.10																	

Rapides Drug Company, Limited, Third & Lee Streets, Alexandria, Louisiana.

H. B. Cohen Drug Company, 243 East 35th Street, New York 16, New York.

Commons Brothers, 33 West 26th Street, New York 10, New York.

Essex Drug Company, 175 West 165th Street, New York 52, New York.

Fulton Drug Company, 45 Fulton Street, New York 7, New York.

118 D. Kaltman & Company, 3200 Jerome Avenue, New York 58, New York.

J. J. Perry Drug Company, 1091 St. Nicholas Avenue, New York 32, New York.

R. D. A. Drug Corporation, 740 Broadway, New York 3, New York.

M. Schulgasser, 439 West 50th Street, New York 19, New York.

Ira J. Shapiro Company, 45 West 11th Street, New York 3, New York.

Z. C. M. I. Wholesale Drug Division, 1665 Bennett Road, Salt Lake City, Utah.

Morphy Drug Company, Council Bluffs, Iowa.

Lincoln Drug Company, Lincoln, Nebraska.

Scott & Gilbert Company, 300 Mission Street, San Francisco, California.

Tacoma Wholesale Drug Company, Tacoma, Washington.

Missoula Wholesale Drug Company, Missoula, Montana.

Charles Hubbard Son Company, Incorporated, 211 West Water Street, Syracuse, New York.

E. C. McKallor Drug Company, Water Street, Binghamton, New York.

Tampa Drug Company, Tampa, Florida.

Johnson Drug Company, Tampa, Florida.

Publix Super Market, Lakeland, Florida.

119 McRoberts Lane Drug, Tulsa, Oklahoma.

120 ANNEX TO ITEM 19

Customer	Amount
Bissettes Drug Store, Wilson, North Carolina	\$4,033.00
Gallagher Drug Co., Dayton, Ohio	6,929.00
Hook Drug, Inc., Indianapolis, Indiana	3,912.00
Peoples Drug Stores, Washington, D. C.	18,846.00
Rea & Derich, Northumberland, Pa.	1,157.00
Reid Drug & Chemical Co., Baltimore, Maryland	3,418.00
Sun Ray Drug Co., Philadelphia, Penna.	17,197.00
Wirtmann & Teah, Inc., Lock Haven, Penna.	305.00
John H. Wood & Co., Philadelphia, Penna.	116.00

<i>Customs</i>	<i>Amount</i>
Army and Air Force Exchange Service, Baltimore, Maryland	356.00
Bucklew's Variety, Lancaster, Penna.	103.00
Dayton Economy Drug Co., Dayton, Ohio	2,974.00
Mar-Matic Sales Co., Baltimore, Md.	300.00
University of Pa., Philadelphia, Penna.	174.00
Walsmith Variety, Rehoboth Beach, Del.	180.00
Westinghouse Corp., Baltimore, Md.	182.00

121 United States District Court, Southern District of
New York.

Admission of facts

[Title omitted.]

[File endorsement omitted.]

McKesson & Robbins, Incorporated, the defendant in the above entitled action, by Hodges, Reavis, McGrath, Pantaleoni & Downey, its attorneys, admits the following facts:

The following wholesale drug divisions of the defendant compete in the sale of McKesson products and other drug products with the wholesalers listed in Annex to Item 7 of the answers to the first set of interrogatories in those places where the trading areas of such wholesalers overlap the trading areas of these wholesale drug divisions: New York, N. Y., Brooklyn, N. Y., Cairo, Ill., Pittsburgh, Pa., Detroit, Mich., Huntington, W. Va., Akron, Ohio.

Dated December 22, 1953.

HODGES, REAVIS, McGRATH,
PANTALEONI & DOWNEY,
Attorneys for Defendant.

By DENIS B. SULLIVAN.

Received a copy of the foregoing Admission of Facts this 29th day of December 1953.

ALLEN A. DOBEY,
Attorney for Plaintiff.

122 United States District Court, Southern District of
New York

Stipulation of facts.

Filed May 16, 1955

[File endorsement omitted.]

[Title omitted.]

It is hereby stipulated and agreed that the following facts may be taken as true for the purposes of this case only but without

any concession by the defendant that such facts are material and relevant:

1. Kiefer-Stewart Drug Company of Indianapolis, Indiana operates throughout the state of Indiana, in eastern Illinois, and western Ohio, and competes with a McKesson wholesale drug division in a part of the territory of each of said states.

2. The southeastern Illinois sales territory of Charles Leich and Co. of Evansville, Indiana extends as far as Mt. Vernon, Illinois and in this sales territory Charles Leich and Co. competes with the McKesson wholesale drug divisions located at St. Louis, Missouri, and Cairo, Illinois. Charles Leich and Co. also competes with the McKesson wholesale drug division located at Nashville, Tennessee in northern Tennessee, inasmuch as the sales territory of Charles Leich and Co. extends to within 40 miles of Nashville.

3. Pennsylvania Wholesale Drug Co. of Wilkes-Barre, Pennsylvania competes with wholesale drug divisions of McKesson in the Elmira and Binghamton, New York area. The sales territory of the Pennsylvania Wholesale Drug Co. covers Broome County, New York, the areas surrounding Elmira and Binghamton and the area between these two cities. Approximately 60 retail accounts are involved in this competition with McKesson.

4. Smith, Kline and French of Philadelphia, Pennsylvania is in competition with wholesale drug divisions of McKesson with respect to approximately 100 retail accounts in the territory indicated below:

Location of McKesson Wholesale Drug Division

Northern New Jersey Counties of Sussex, Morris, Warren, and Somerset. Newark, New Jersey.

Pennsylvania Counties of Somerset, Indiana, and Cambria. Pittsburgh, Pennsylvania.

Pennsylvania Counties of Tioga, Bradford, Warren, McKean, and Potter. Rochester, New York.

The Mercer Wholesale Drug Company of Trenton, New Jersey, a wholly-owned subsidiary of Smith, Kline and French, Inc., competes with the McKesson wholesale drug division at Newark, N. J. in the following New Jersey counties:

Mercer

Middlesex

Hunterdon

Monmouth

5. Kauffman-Lattimer Co. of Columbus, Ohio competes with wholesale drug divisions of McKesson in the counties indicated below:

124 *Akron and Cleveland Area Competition by Counties*

Hancock	Huron	Coschocton
Seneca	Richland	Stark
Wyandot	Ashland	Tuscarawas
Marion	Wayne	Harrison
Crawford	Holmes	

Cincinnati Area Competition by Counties

Miami	Clinton	Pike
Montgomery	Fayette	Fairfield
Clark	Highland	
Greene	Ross	

Huntington Area Competition by Counties

<i>Kentucky</i>	<i>West Virginia</i>	<i>Ohio</i>
Scioto	Wayne	Boyd
Jackson	Capell	
Lawrence	Logan	
Meigs	Raleigh	
Athens	Lincoln	
Washington	Kanawha	

6. Owens and Minor Drug Company of Richmond, Virginia competes in the western part of the State of Virginia with the McKesson wholesale drug division located at Roanoke, Virginia.

7. Most of the customers served by each of the above-mentioned wholesalers are located in areas where there is no competition from any McKesson wholesale drug division. In those areas where there is such competition this stipulation is not to be construed as indicating the intensity of such competition except as indicated above.

ALLEN A. DOBEY,

Attorney for Plaintiff.

HODGES, REAVIS, McGRATH,

PANTALEONI & DOWNEY,

Esqs.,

Attorneys for Defendant.

Per DENIS B. SULLIVAN.

Stipulation of facts

Filed May 16, 1955

[File endorsement omitted.]

[Title omitted.]

It is hereby stipulated and agreed that the following facts may be taken as true for the purpose of this case only but without any concession by the defendant that such facts are material and relevant:

In some instances some independent wholesalers and some of the McKesson wholesale divisions have filled single orders from retailers for McKesson products amounting to \$1000 or more, but such instances have been rare.

ALLEN A. DOBEY,

Attorney for Plaintiff.

HODGES, REAVIS, McGRATH,

PANTALEONI & DOWNEY, Esqs.,

Attorney for Defendant.

By DENIS B. SULLIVAN.

Deposition of Wilbur E. Dewell

Filed May 16, 1955

[Title omitted.]

Deposition of Wilbur E. Dewell, taken by the Plaintiff, pursuant to notice dated February 9, 1955, held at the United States Courthouse, Foley Square, New York, on Thursday, February 10, 1955, at 9:30 a.m. before a Notary Public of the State of New York.

APPEARANCES

Richard B. O'Donnell, Esq., Special Assistant Attorney General, for the Plaintiff United States of America, by Allen A. Dobey and William F. Rogers, Esqs., Trial Counsel for Plaintiff. Hodges, Reavis, McGrath, Pantaleoni & Downey, Esqs., Attorneys for Defendant, 20 Pine Street, New York, N. Y., by Denis B. Sullivan, Robert Thurn and L. C. Ehrhardt, Esqs., of Counsel.

128 WILBUR E. DEWELL, having been first duly sworn by Benedict De Buil, a Notary Public of the State of New York, testified as follows:

Examination by Mr. DOBEY:

Q. Mr. Dewell, would you state your full name?

A. Wilbur E. Dewell.

Q. By what company are you employed?

A. McKesson & Robbins, Inc.

Q. What is your position with that company?

A. I am general manager of the Manufacturing Division of our company, a vice president and a director of the company.

Q. Do your duties as vice president include any duties in connection with any other division of the company other than the Manufacturing Division?

A. No.

Q. How long have you held the position of vice president and general manager of the manufacturing division?

A. Well, now—

Q. Approximately.

A. Well, as long as it is approximately—

Q. Approximately.

A. I believe it is 1936; I believe it was.

129 Q. I am going to ask you a number of questions in which I use the term "McKesson," and when I say "McKesson," I will mean McKesson & Robbins, Inc., in order to avoid a repetition of the term. I will say "McKesson," and you will understand that to mean McKesson & Robbins, Inc.

A. And not the Manufacturing Division?

Q. That is right. When I refer to the Manufacturing Division, I will refer to it specifically.

A. All right.

Q. First, I would like to have you tell us a little bit about the origin and growth of McKesson. Did McKesson originate as a manufacturer or as a wholesaler?

Mr. SULLIVAN: We are getting a bit confused now. Here you are talking about McKesson—

Mr. DOBEY: The corporation—

Mr. SULLIVAN: And you said before when you would refer to the Manufacturing Division, you would refer to it as such: Are you talking now about the origin of the Manufacturing Division or the origin of the Wholesale Division?

Mr. DOBEY: I want to know when the corporation originally began business, whether it began business as a manufacturer or as a wholesaler, or as both.

The WITNESS. To the best of my knowledge—

130 Mr. SULLIVAN. To the extent of your knowledge, of course.

The WITNESS. To the extent of my knowledge, it started as a manufacturing division—a manufacturing operation 122 years ago.

Q. Approximately when did it go into the wholesale field?

A. Approximately, as McKesson & Robbins, Inc., I think it was around 1928 or 1929.

Q. Since it went into the wholesale field originally in 1929, has the operation of the corporation expanded in the wholesale field?

A. Yes.

Q. What is the relative size of the manufacturing operation of McKesson as compared with the wholesale operations of McKesson at the present time?

Mr. SULLIVAN. You mean unitwise, or dollarwise?

Mr. DOREY. We will make it dollarwise.

Q. For example, what approximately today are the total annual dollar volume sales of all products made by the Manufacturing Division?

A. I think you have the answer to that in the original statement, and I don't carry those figures around in my head, but I
131 am quite sure that I gave that information to counsel back in 1951 or 1952, and I have not the exact figures in my head at the moment.

Q. I am not interested in the exact figures, and I don't have the figures in the record, in any event. What were your annual sales for your last fiscal year for your Manufacturing Division, approximately?

A. Around \$11,000,000.

Q. And what were the annual sales of the wholesale drug divisions for last year, approximately?

A. Well, I would be guessing pretty much on that because the consolidated total sale figures include liquor and heavy chemicals, that phase of it, so that information can be gotten accurately, so I don't know whether I should guess at it.

Q. Could you tell me the approximate dollar volume sales of the wholesale drug divisions of drug products for last year?

Mr. SULLIVAN. If you know.

The WITNESS. Well, I don't, that is why I don't want to give a figure here that is going to be kicked around, and I would have to get that from our controller.

Q. Would you care to answer this question: Do the wholesale drug divisions—this dollar volume of their sales—is it two,
132 three, four times your manufacturing sales.

A. Oh, it is considerably more than the manufacturing sales; yes.

Q. Several times more?

A. Oh, yes.

Q. What would be your approximation how many times more, conservatively?

A. Well, I sometimes think that instead of guessing at this, that if that is a question that must be answered, sometimes it must be answered by a controller.

Mr. DOBEY. Maybe your counsel would be willing to state for the record.

Mr. SULLIVAN. Mr. Dewell has given you the approximate gross dollar volume of sales of the Manufacturing Division. Next month you will have here Mr. Nolen, who is much more familiar than Mr. Dewell with the operations of the whole drug divisions, and I suggest that you question him.

Mr. DOBEY. If you prefer, I have no—

Mr. SULLIVAN. The point I am trying to make is that Mr. Dewell's activities are confined almost exclusively to the operations of the Manufacturing Division. On the other hand, Mr. Nolen's activities are confined presently to the operations
133 of the Wholesale Division.

Mr. DOBEY. Yes, but he is a vice president and a member of the board of directors of the corporation, and as such, I think he would have a notion of the approximate dollar sales of the Drug Division.

Mr. SULLIVAN. Why approximate it when you can get a more definite figure when Mr. Nolen is here on his examination?

Mr. DOBEY. If we approximate them, we realize that the accurate figures are not necessary—are not accurate.

Mr. SULLIVAN. Well, I think the best approximation that you can give, Mr. Dewell, is that it is several time greater than the gross sales of the Manufacturing Division.

The WITNESS. Yes.

Mr. DOBEY. All right.

Q. Have the wholesale drug division sales in recent years been increasing in proportion to the sales of the manufacturing division, or decreasing?

A. Let's see if I get that—I want to be sure if I get the real sense of the question. Will you state it again?

134 Q. Maybe I can state it a little differently: Has the manufacturing division been growing more rapidly from sales volume standpoint than the wholesale drug divisions, or is it vice versa?

Mr. SULLIVAN. If you know.

The WITNESS. As a matter of fact, I don't know, and there are several reasons why I don't.

Q. You don't know?

A. I don't know.

Q. Very well. You mentioned the figure of \$11,000,000—approximately \$11,000,000 as your annual sales of products by the manufacturing division?

A. Yes.

Q. Are you including in that figure your shipments of McKesson products to the wholesale drug divisions of McKesson?

A. Yes, sir.

Q. What is the approximate dollar volume of your sales of McKesson products direct to retailers?

A. I think that question has been answered.

Mr. SULLIVAN. Well, we have answered that question partially in the interrogatories. In the interrogatories we gave you the names of retailers to whom the manufacturing division sells directly, which are located in the trading areas of the independent wholesalers with whom no McKesson division is in competition. I think we gave you in the interrogatories the names of some sixteen retailers.

Now, is your question addressed to these retailers?

Mr. DOBEY. No, my question is the total sales by the manufacturing division direct to retailers, approximately.

Mr. SULLIVAN. To all retailers including those?

Mr. DOBEY. All retailers in the United States.

The WITNESS. That question—when you say “retailers,” you mean that we sell out of the manufacturing division independent entirely of any wholesale?

Q. Yes, independent of your wholesale drug division sales.

A. Or any wholesale drug division?

Q. Yes, independent of—what you sell direct.

A. Are you talking about wholesalers or just McKesson wholesale?

Q. No, independent of any wholesalers, what you sell direct from Bridgeport.

A. Oh, I would say approximately somewhere between eight and ten percent.

136 Mr. SULLIVAN. For what period?

The WITNESS. Of the yearly period.

Q. Eight and ten percent of your total sales?

A. That is right, that we sell direct to retailers.

Q. What approximate dollar volume would that be?

A. Well, it would be eight to ten percent of the figure I gave you.

Q. About a million dollars or a little more?

A. Yes, in that neighborhood.

Mr. SULLIVAN. Or less.

The WITNESS. Or less.

Q. You have given us the figure of \$763,567 as representing the total sales of your manufacturing division to independent wholesalers for the fiscal year ending June 30, 1952. Are your sales direct to retailers greater than your sales to independent wholesalers?

A. I haven't the figures with me. When the figures were given to you that was the case.

Q. For that year?

A. For that year, but I don't have with me figures—that, I think, is 1951 or 1952 when I was asked for that information at the time.

Q. At the present time can you tell me whether your sales
137 direct to retailers are greater dollar volumewise than your sales to independent wholesalers?

A. No, I can't actually.

Q. How many vice presidents are there in the manufacturing division?

A. Three.

Q. How many in the wholesale drug divisions?

A. I would be guessing; there is an elective and there is an appointive, so I don't know whether you are talking about those elected by the stockholders or what, so I would rather not answer.

Q. Any vice presidents of the company.

Mr. SULLIVAN. Well, I believe, Mr. Dobey, there are quite a number of vice presidents of different ratings and groups.

The WITNESS. That is right.

Mr. SULLIVAN. There are vice presidents and there are regional vice presidents, and there are—

Mr. THURN. Well, there are also so-called elective vice presidents; so-called appointed vice presidents. Actually, the bylaws provide for two classes of officers, and so you do get a very complicated question.

Q. Do you think I should save that for Mr. Nolen?

A. Yes, I would say that.

138 Mr. EHRHARDT. I don't think Mr. Nolen would know.

Mr. DOBEY. We can find that out, and it can be asked of Mr. Nolen.

Mr. EHRHARDT. Oh, yes, it can be found out.

Q. Who is your immediate superior?

A. My immediate superior?

Q. Yes.

A. The president of the company.

Q. You have no superior in the manufacturing division?

A. No.

Q. Is there any officer of the wholesale drug division who exercises a control over operations of the manufacturing division?

A. That exercises control?

Q. Over the operations of the manufacturing division.

A. I am the manager of the manufacturing division.

Q. What is the approximate number of employees of the manufacturing division?

A. Oh, it will vary from 480 to 525, depending on the seasons of the year.

Q. Now, I would like to direct attention to Paragraph 4 of the answer in this case. In Paragraph 4, McKesson admits the
139 allegations in Paragraphs 4 and 5 of the complaint—and this is the part to which I am directing your attention specifically—that the conduct of its business as a wholesaler of drugstore merchandise is separate and distinct from and on an entirely different functional level than the conduct of its business as a manufacturer of drugs and drug products. Both the wholesale drug divisions and the manufacturing division are part of one and the same corporation, of course, are they not?

A. Yes.

Q. The wholesale drug division of course, does not have a separate president?

A. No.

Mr. SULLIVAN. Well, now, Mr. Dobe, there is one president.

Mr. DOBEY. Right.

Mr. SULLIVAN. For the whole company.

Mr. DOBEY. Right.

Q. Does the president have supervision and control over both the wholesale drug division and the manufacturing division?

A. As the office of the president would have; yes.

Q. Are there any other officers other than the president
140 of the corporation who performs duties with respect to both the manufacturing division and the wholesale drug divisions?

Mr. SULLIVAN. Well; of course, there is a board of directors, there is one board of directors.

Mr. DOBEY. I am referring to officers, not members of the board of directors.

The WITNESS. No.

Mr. EHRHARDT. Well, there is the chairman of the board.

The WITNESS. The chairman of the board is an executive officer.

Q. No others?

A. No others.

Q. Are there any employees of McKesson who perform duties for both the manufacturing division and the wholesale drug division?

A. I don't know that I understand the—

Q. Any employees whose duties involve work for both the manufacturing division and the wholesale drug division?

A. I want to be sure that I understand that question. In the daily routine of hourly workers and officers, the answer is "No".

Q. With respect to advertising work for McKesson products, is that done by the manufacturing division or the wholesale drug divisions, or both?

A. All advertising as it relates to our products is done by the manufacturing division and so paid.

Mr. SULLIVAN. When you say "our products," you mean the manufactured products?

The WITNESS. Yes; I am speaking of the manufacturing division.

Q. Would that include promotion work with doctors?

A. The advertising?

Q. Yes.

A. Yes; I want to be sure that I understand that. We use the journal of the American Medical Association in which they advertise our products, if that is the question.

Q. Well, you also send literature directly to them?

A. Yes, we do, and samples.

Q. And all that comes from the manufacturing division?

A. That is correct.

Q. I would like to direct your attention to Paragraph 10 of the answer, wherein referring to the different divisions of McKesson, the answer states: "The functions, purposes and

objectives of each are different, and except insofar as it is necessary to formulate overall policy for each and generally to supervise and control their activities, the operations of each are conducted separately and independently of the others by different staffs and officers and employees in different and, to a considerable extent, entirely separate establishments."

Mr. SULLIVAN. You preface that by saying the different divisions of McKesson, and the answer says that it conducts three separate and distinct businesses. I assume that that was just—

Mr. DOREY. That is right, you are right.

What I want to question Mr. Dwell about is the insertion: "Except insofar as it is necessary to formulate overall policy for each."

Q. What officers formulate overall policy for both the wholesale drug divisions and the manufacturing divisions?

A. Well, to the best of my knowledge, it would be the chairman of the board and the president.

Q. And those same officers, the chairman of the board and the president, are the officers who supervise and control the activities of both the wholesale drug divisions and the manufacturing division?

A. I think the answer to that would be yes.

Mr. SULLIVAN. Generally to supervise.

143 Mr. DOBEY. Yes.

The WITNESS. Yes.

Q. Now, according to this paragraph, "The operations of each are conducted separately and independently of the others by different staffs of officers and employees in different, and to a considerable extent, entirely separate establishments."

With respect to that statement, "to a considerable extent entirely separate establishments," to what extent are the operations of both the manufacturing division and the wholesale drug divisions conducted in the same establishments?

Mr. SULLIVAN. I think you are assuming that—something that is not implicit in the answer. It says that the three separate and distinct businesses, referring to the wholesale drug business, the wholesale liquor business, and the manufacturing business, are conducted—

Mr. DOBEY. To a considerable extent.

Mr. SULLIVAN. To a considerable extent in separate and distinct establishments.

Mr. DOBEY. Now, I want to know to what extent the manufacturing division and the business of the wholesale drug
144 divisions are conducted in the same establishments.

Mr. SULLIVAN. Well, the manufacturing division, of course, has an establishment of its own.

Mr. DOBEY. Let the witness answer, if he can answer the question.

The WITNESS. I answer it with this reservation, that I hope I understand exactly the trend of the question. We have a building in Connecticut in which there is nothing done and no other officers or people employed except those directly interested in the exploitation, and the manufacturing and handling of the manufactured products. There is no wholesale function, there isn't even a wholesale division in it. So it is as entirely as can be separated by miles and by intent.

Q. That covers everything except the answer to my question. The statement here—"The operations of each are conducted separately and independently of the others," and et cetera, "and to a considerable extent entirely separate establishments"—implies to me that to some extent the operations of each are not conducted in these entirely separate establishments. And my question was to what extent are they conducted in the same establishment?

145 Mr. SULLIVAN. Perhaps I can clarify what you have in mind there.

Mr. DOBEY. All right.

Mr. SULLIVAN. That was directed principally to the businesses of wholesaling drug products and to the business of wholesaling liquor products. There are, in McKesson's operations, several areas where the wholesaling of drugs and the wholesaling of liquor is conducted under the one roof.

Mr. THURN. Although in segregated premises.

Mr. DOBEY. And that is why that reads as it does?

Mr. SULLIVAN. That is correct.

Mr. DOBEY. Very well.

Q. Does the manufacturing division sell McKesson products to any other manufacturer of drug products?

A. To any other manufacturer?

Q. Any other manufacturer?

A. To the best of my knowledge, no.

Q. Now, the manufacturing division does sell McKesson products direct to retailers as we previously mentioned, does it not?

A. It does.

Q. Now, how do you reconcile the practice of the manufacturing division, that is the practice of selling McKesson products direct to retailers, with the statement contained in Paragraph 4 of the answer, to the effect that the conduct of McKesson's business as a wholesaler of drugstore merchandise is on an entirely different functional level than the conduct of its business as a manufacturer of drugs and drug products?

A. Well—

Mr. SULLIVAN. I don't understand the question, Mr. Dobey.

The WITNESS. I don't understand that either.

Mr. SULLIVAN. I don't see that it requires any reconciliation. We simply state here that in the conduct of its business as a wholesaler of drug merchandise, it is separate and distinct from and on an entirely different functional level than the conduct of its business as a manufacturer.

I suggest that you clarify your question. Are you—

Mr. DOBEY. Well, your answer states, and I assume—maybe the wording of the answer is not your language, Mr. Dewell, but the answer states that the conduct of your business as a wholesaler—that is, your wholesale drug divisions—is on an entirely different functional level than the conduct of your business as a manufacturer. Yet you sell direct to retailers and your wholesale drugs divisions sell direct to retailers.

Q. Now, how do you maintain that your manufacturing business is on an entirely different functional level than your wholesale business?

A. Well, manufacturing is an entirely different function than wholesaling. That is my total answer. I mean that is historically so, I mean that is the industry.

Q. Yet, selling McKesson products direct to retailers is done by both your manufacturing division and your wholesaling divisions is it not?

A. At different levels.

Q. You both are selling retailers, both the manufacturing division and—

A. Yes, yes.

Q. Well, is not that on the same functional level?

Mr. SULLIVAN. That calls for a conclusion.

The WITNESS. I can't answer that. "Functional" to me means—

Mr. SULLIVAN. It is our contention, of course—

The WITNESS. Manufacturing and advertising is a functional phase, but manufacturing operation is not just the customers you sell, so I can't answer that question.

148 Q. Don't you include in your definition of "functional level"—

A. That is only part of the question.

Q. (Continuing.) The sale of products to retailers?

A. That is not as I understood the question. The functional level embodies the total operation, not just one piece of it, as I interpret it. Now, that was my answer at the time, and it is still my answer: In the total overall functional level, it is different.

Q. Both in the manufacturing division and the wholesale drug divisions, you supply retailers with their supply of McKesson products?

A. Yes.

Q. Now, with reference to the manufacturing division when it sells direct to a retailer, are you not also performing the wholesaling function?

Mr. SULLIVAN. That calls for a conclusion.

The WITNESS. I can't answer that.

Mr. SULLIVAN. It is our contention that we are not; that is one of the issues in this case.

The WITNESS. That is a legal answer.

• Mr. SULLIVAN. It is one of the questions in this case. It is our contention that as manufacturers we sell to wholesalers and
149 retailers, and as wholesalers, we sell to retailers.

Now, it is our contention legally that that is at different functional levels.

Q. I am asking a fact question; this is a fact question: In supplying retailers with their stocks of McKesson products, does not your manufacturing division perform the same function that is performed by your wholesale drug division, namely, supplying retailers—

A. The answer to that is no.

Q. (Continuing.) With their stocks of McKesson products?

A. That is too technical for me to answer.

Mr. DOBEY. It seems to me it is a clear-cut question.

Mr. THURN. You can sell retailers on an entirely different basis: your market is different from a wholesalers market, even though he is selling to retailers. So you are calling for a legal conclusion that depends on a lot of facts that have not been brought in.

Mr. SULLIVAN. The fact has been established that McKesson is a manufacturer and it sells to retailers. Now, if you want to draw a conclusion that it is selling to retailers, that is your prerogative.

150 Mr. DOBEY. I am asking him the fact question—the manufacturing division did not perform the same function of supplying retailers with their stocks of McKesson products, that is performed by the wholesale drug divisions.

Mr. SULLIVAN. That I again state calls for a legal conclusion.

Q. Will you answer that question?

Mr. THURN. He has already answered it.

Mr. EHRHARDT. Let me see, Mr. Dobey—

Mr. DOBEY. There is no point in arguing the point. We might as well go on. It is a factual question. The function of supplying retailers with McKesson products, the record shows, is performed by both the wholesale division—

Mr. THURN. A manufacturer sells retailers who wholesalers do not sell, because they are retailers who can and do buy direct. So your word "function" is a loaded word that calls for a legal conclusion.

Q. Both the manufacturing division and the wholesale drug divisions, in selling McKesson products to retailers, are providing retailers with their stocks of McKesson products for retail to consumers, are they not?

151 A. If I understand the question correctly, the answer would be yes.

Q. Does the manufacturing division solicit orders for the sale of McKesson products by the manufacturing division direct to retailers?

A. Solicit orders for sale of our products direct to retailers?

Q. Yes.

A. Yes.

Q. What methods of solicitation are employed?

A. Well, I can't enumerate them all, except that which is usual and customary in the industry.

Q. And what is that?

A. Well, it covers many, many fields. It covers salesmen, the use of trade publications, mailing pieces, display activities and that sort of thing.

Q. It includes salesmen?

A. Oh, yes.

Q. How many salesmen of the manufacturing division are there, approximately, that you have who contact retailers, soliciting orders for McKesson products?

A. There again, the whole question would have to be clarified. We have got two types of salesmen soliciting, some who sell direct to a retailer, and others who turn orders over.

152 Q. Well, suppose we limit it.

A. To the retailers?

Q. To the ones who sell direct to retailers.

A. That is right, we do, we have men who call on them.

Q. Approximately how many?

A. Around eight or nine.

Q. Are those eight or nine salesmen who solicit orders for sales of McKesson products by the manufacturing division direct to retailers, the same salesmen who solicit orders for sales to independent wholesalers?

A. No, they are not.

Q. They are not the same—they don't call on the wholesale trade?

A. No, it is a different type of trade, a different level of trade.

Mr. SULLIVAN. I assume you are confining these questions entirely to the salesmen employed by the manufacturing division?

Mr. DOBEY. Yes.

Q. I think you understood that?

A. Yes, that is as I understood it.

Q. In what territory does the manufacturing division
153 solicit orders for McKesson products for direct sale by the manufacturing division to retailers?

A. Well, I won't attempt to answer all of them here, out of my head, because I am not director of sales. We have a sales manager. But I can give you roughly, Detroit, Pittsburgh, Kansas City, Chicago, Los Angeles. Those are areas which they have solicitation.

Q. Of retailers?

A. Of a retailer which in many cases are multiple. When I speak of Chicago, that is Walgreen, 500 stores; that is one call.

Mr. SULLIVAN. Then, of course, you have the salesmen who contact the retailers whose names were given to you in the answers to the interrogatories.

The WITNESS. That you have there. But this is a double question.

Q. I am covering your total. That was limited.

With respect to the specific cities you mentioned, do the salesmen there have a definite territory assigned to them—the salesmen who contact retailers for the manufacturing division?

A. The situation varies, according to the requirement of the market.

Q. Do you include the entire United States in your solicitation of retailers by the manufacturing division?

154 Mr. SULLIVAN. For direct sales?

Q. For direct sales.

A. Well, when you say do we include it—we attempt to sell many people who don't buy from us, so, I mean the question is—I can't answer it because we—

Q. I am asking you, do you solicit? I am not asking you about your sales, I am asking you about your area of solicitation.

A. Yes, we try to sell everybody, not only here, but export as well.

Q. Throughout the United States?

A. Sure, that is our function, it is desirable accounts that we want.

Q. Do salesmen of the manufacturing division solicit orders from the same retailers solicited by salesmen of the wholesale drug divisions?

A. The intent is not to. Now, I can't sit here and say that it won't happen.

Q. You try to avoid it?

A. That is right. We are trying to have a definite schedule and not have double solicitation.

Q. Do salesmen of the wholesale drug divisions solicit
155 orders from retailers for McKesson products on behalf of the manufacturing division?

A. The same function they would for any manufacturer.

Q. No, I am referring to—my question isn't clear.

I am referring to soliciting orders which they—for direct sale by the manufacturing division to retailers—

Mr. THURN. By salesmen of wholesale divisions?

Mr. DOBEY. Yes.

The WITNESS. No; they do not return us any direct business.

Q. Then a salesman for the wholesale drug division solicits orders for the wholesale drug division, and not for the manufacturing division at all?

A. That is not only true with McKesson wholesalers, but other wholesalers. No other wholesalers send us orders to fill direct. I wish they would, but they don't do it that way.

Q. Do the manufacturing division salesmen call on all retailers of drug merchandise within their territory?

Mr. SULLIVAN. What salesmen are you referring to?

Mr. DOBEY. Salesmen of the manufacturing division.

Mr. SULLIVAN. All salesmen, or just those who solicit orders for direct sales?

156 Mr. DOBEY. Those who solicit orders for direct sales.
The WITNESS. Do they call on all retailers?

Q. Yes.

A. No, that number that we have couldn't possibly—I mean that answers itself.

Q. Does the manufacturing division sell McKesson products direct to any retailers who desire to buy direct from the manufacturing division?

A. That takes in so many qualified statements—there is credit, there is any number of—

Q. Assuming the credit is all right.

A. Assuming that the account is desirable in every sense, the answer is yes.

Q. What are the standards which a retailer must meet in order to buy McKesson products direct from the manufacturing division?

A. Well, let's see if I can answer that. I think what you are trying to ask me—and I am going to try to answer what I think you are trying to ask me rather than the way you state your question—you are trying to ask me what is a desirable account. A desirable account may be one day something, and the next day, it won't be; and I can't tell you when, as, and if. That is about the best answer I can give you.

157 Q. If I was a retailer and wrote to the manufacturing division, and said I wish to buy direct from the manufacturing division, what questions would you ask me before you decide what you would sell me direct?

A. Well, I probably would start with your credit. That would be about the first thing.

Q. Assuming my credit is all right, what is next?

A. Then the next thing is if you were—to what extent you would cooperate with us, and you would answer that one, so you tell me to what extent you would cooperate with us, and then I can answer your question?

Q. What do you mean by "cooperation"?

A. I am not asking you anything; you are asking me to do something.

Q. I am going to sell your products to consumers.

Mr. SULLIVAN. I think you are being confused here, Mr. Dewell.
The WITNESS. I think I am.

Mr. SULLIVAN. What he wants to know, if I understand his question, the manufacturing division sells direct to some retailers?

The WITNESS. Yes.

Mr. SULLIVAN. Other retailers it does not sell directly to?

158 The WITNESS. Well, that becomes then a level of quantity purchase.

Mr. SULLIVAN. How do you determine the ones that you will sell direct to as distinguished from the ones that you will not sell direct to?

The WITNESS. Well, normally, the credit is number one and then the other is what facilities do they have for taking in and handling the quantities required by direct. There is a certain requirement on dollar purchases in order to buy on a direct basis which is customary in the industry.

Q. Are there any other requirements other than the quantity requirement for direct buying?

A. Well, no.

Mr. THURN. I think again you are being confused on the question of—Mr. Dewell expressed it before when he said, "What can you do for us," meaning pushing products and things like that.

The WITNESS. Yes, sure.

Mr. THURN. So his answer should include, "There are other things in it."

The WITNESS. Yes.

Q. Assume I meet the quantity requirement and assume
159 my credit is good, what more would you want from me to buy direct from the manufacturing division?

A. Well, we would probably check on the character of you in your community, your standing in the community; we would take a look at it. We would probably get something about your reputation for fulfilling commitments.

Q. Anything else?

A. And then we probably would exercise our rights to determine whether you were the type of account we would like to have and work with, and then there would be commitments that you would make as to what you would do.

Q. Assume you decide I was a desirable account, what commitments would I have to make in order to buy direct?

A. Well, you would have to meet our terms and requirements which are published.

Q. Well, what is the substance of them?

Mr. SULLIVAN. You mentioned volume before.

The WITNESS. Yes, there is a volume requirement.

Q. What else?

A. The character of the individual at stake.

Q. Anything else?

A. Not that I can think of.

160 M. EHRHARDT. May I ask a question? Is there judgment involved on the part of the manufacturing division as to how the retailer will do with the manufacturing division's products?

The WITNESS. As to what he will do?

Mr. EHRHARDT. Let me just rephrase that. I think it will clarify it: Are there rigid requirements which if met, means you will sell, or is there an absence of—is there more to it than just rigid requirements?

The WITNESS. Well, I can't even answer that question, I mean as to rigid requirements; the thing is so far over my head.

Q. Let me ask you this question: Assuming I was a desirable retail account from the quantity standpoint and the credit standpoint, what commitments would you ask me to make?

A. Well, I think I have answered your question by saying that we generally solicit business from retailers that we want to sell merchandise. Now, if we solicit you only, we want to sell you.

Q. A moment ago you referred to the term "commitments to be made by me."

A. Well, you restated the case. Supposing you send us an order; well, those things don't happen; I mean you are talking about something that doesn't happen.

161 Q. No, I am talking about the term "commitments" you referred to, to be made by me.

A: Well, in the event you did, then we would take a look, but people don't just sit down and send us orders, so I can't answer a question that doesn't exist.

Q. My question is solely with respect to the word "commitments." A moment ago you said there would be commitments to be made by me as a direct buyer.

A. Well, I think I have answered it.

Q. No. If you have, I haven't understood it.

A. Well, I haven't understood the question, so we are back where we started.

Q. What do you wish me to promise to do, what do you want me to promise?

A. We want you to pay for the merchandise promptly. We want you to put it on display, present it to the public, and we want you to pay some sort of attention to your clerks to get them to sell our merchandise; we want you to promise that you will do that, and then we want to be sure that you are not one of these fellows who buy and want to return everything so often.

Now, that comes after experience—if you got to write about it, and send it back, and were a problem child, then we don't want to fool with you any longer, period.

162 Q. Any other commitments?

A. I think that is it.

Q. What is the minimum quantity requirement for the sale by the manufacturing division of McKesson products direct to a retailer?

A. \$1,000.

Q. Is that per year or per order?

A. That is per order.

Q. If the retailer is to buy direct from the manufacturing division, each order must be for \$1,000?

A. To get the complete discounts; yes.

Now, if he wanted to buy from us on the same basis that he would buy from a wholesaler, no matter who the wholesaler is, he would buy from us exactly on the same terms as he would buy from the wholesaler, and we would honor that order.

Q. Are the sales of McKesson products by the manufacturing division direct to retailers made at McKesson's published net wholesale prices?

A. Ask the question again, because—

Q. Are the sales of McKesson's products by the manufacturing division direct to retailers made at McKesson's published net wholesale prices?

163 A. Up to the direct requirement of \$1,000 for quantity purchases.

Q. With respect to the \$1,000 order or above, is that made at a discount below the seller's published net wholesale prices?

A. Net wholesale prices; yes, it is.

Q. How much lower?

A. Five percent.

Q. Is this true: If I am a retailer buying direct from the manufacturing division, and I submit an order to the manufacturing division in excess of \$1,000, I can buy the merchandise at a five percent lower price than I can buy the merchandise from the wholesale drug division?

A. That is right.

Q. Is the same thing true if I submit an order direct to the manufacturing division in excess of \$1,000, I can buy that merchandise at a price five percent lower—

A. Yes, sir.

Q. (Continuing.) Than the price at which I can buy the merchandise from independent wholesalers of McKesson's products?

A. That is right.

Q. Well, the manufacturing division, then, allows retailers who purchase direct from the manufacturing division a five percent discount on orders over \$1,000, over and beyond the discount allowed to retailers who buy from the wholesale drug divisions or independent wholesalers?

Mr. SULLIVAN. He has answered that question, I believe, several times.

The WITNESS. Yes; I have answered it a dozen times.

Q. Is the answer yes?

Mr. SULLIVAN. He has given the answer.

The WITNESS. Well, let's see, I don't know, check your notes; you are confusing me.

Mr. DOBEY. Would you read that back.

The WITNESS. You are confused on what is a retailer or what is not a retailer.

(The record was read back by the stenotype reporter.)

Q. You answered that question yes?

A. That is the same question.

Mr. SULLIVAN. The same, yes; and the same answer.

The WITNESS. I can't say any different in the question; I can't double talk.

Q. Well, the answer is yes?

A. It is to the first question.

Q. And you say the second question—

165 A. I don't remember your second question.

Q. He just read it back to you.

A. Well, I still don't remember it. It is yes to the first one he read.

A. Well, I will give a simple illustration so that the record will be perfectly clear on this point:

If People's Drug Stores submits an order to the manufacturing division in excess of \$1,000, People's Drug Store can buy the McKesson products at a five percent cheaper price than a retailer who purchased the same order in the same quantity from an independent wholesaler; is that correct?

A. That isn't the same question.

Q. I wasn't trying to make it the same question. ○

Mr. THURN. Mr. Dobey, there is an assumption in there; the assumption is that the retailer would purchase from the wholesaler in that quantity.

Mr. DOBEY. That is right.

Mr. THURN. All right.

Mr. EHRHARDT. Then isn't the question, is the assumption correct?

The WITNESS. The assumption is that if that retailer sent—I don't know what the wholesaler is going to do—the assumption is if he sent it to me, he would buy it at the same price that People's would. You are assuming that I assume what the other fellow is going to do. If you as a retailer sent that same \$1,000 order to me that People's sent to me you would buy it at the same price.

Q. If I was allowed to buy it direct.

A. That is right. If you were qualified to buy it direct.

Q. No. I am talking about a retailer who does not qualify to buy direct, or is not—at least does not buy direct from you, he buys from the wholesale drug division, or he buys from an independent

wholesaler, and he purchases McKesson products; he submits an order in excess of \$1,000. If he can buy direct from you he gets a five percent discount?

A. That is right.

Q. And that he is—you said sure, did you, you said yes?

A. No—

Mr. THURN. Mr. Dobey, he didn't say before—he said that any order that was sent in would be honored.

Mr. EHRHARDT. You say he didn't say, or he did say?

167 Mr. THURN. He did say. So the assumption that this other retailer couldn't buy direct is incorrect. What those other questions were directed at is the type of customer, retail direct customer that those salesmen aggressively seek to sell direct to.

The WITNESS. That is right.

Mr. THURN. Do you see the difference? Anybody can send in an order and have it filled for over \$1,000. But the manufacturing division has direct customers. The ones it seeks are those who will do a terrific merchandising job.

Mr. DOBEY. And they get a five percent discount?

Mr. THURN. So does any retailer who wants to send in an order get it.

Mr. DOBEY. To whom?

Mr. THURN. To the manufacturing division.

Mr. DOBEY. If the manufacturing division will sell that retailer direct?

Mr. THURN. Mr. Dewell testified earlier if he sent in the order, it would be honored.

Mr. SULLIVAN. And if it was for over \$1,000, he would get a five percent discount; that was his testimony.

Mr. DOBEY. Now, we have got to get this straightened out.

168 Q. I am a retailer who does not buy direct from the manufacturing division because I don't meet your standards, whatever they are.

Mr. SULLIVAN. Wait a minute, Mr. Dobey, you are assuming something again. The previous question with respect to the type of retailers solicited by the manufacturing division for direct sales is one thing. You asked him what requirements there are for that retailer to meet. Now, any retailer who wants to send an order direct to the manufacturing division will get that order filled. And if it is for more than \$1,000, he will get that five percent discount you are talking about.

The WITNESS. You see, you have got it all confused in your own mind.

Q. No; it is not confused in my own mind.

A. I didn't say five percent gets—I didn't say he gets five percent.

Q. Yes; five percent additional discount.

A. So it is additional, it isn't five percent. As long as we are going to clear it up, let's clear it up.

Q. If he buys direct from the manufacturing division with respect to an order over—

169 A. You are talking now about our whole discount program as was published, so why should we waste time here.

Q. Will you answer the question?

A. I can't understand them.

Mr. SULLIVAN. He will answer the questions if you will make them explicit.

Mr. DOBEY. I am afraid they are being very explicit; I am afraid that he is the trouble.

Q. If a retailer submits an order to the manufacturing division for McKesson products in excess of \$1,000, does he receive a discount of five percent over and above the discount he would get if he bought those products in the same quantity from a McKesson wholesale drug division?

A. The answer is yes.

Q. And is the same thing true if he bought the products, the same quantity; from an independent wholesaler?

A. That is supposed to be so, but I can't answer—there are things that go on in the industry that I can't answer and assure you a hundred percent of. He is supposed to. That is based on a supposition.

Q. When you say, "He is supposed to," you mean if he lives up to your Fair Trade price schedule, is that correct?

A. That is correct.

170 Mr. SULLIVAN. But there is no assumption that that same retailer who placed the order with a wholesaler or with a wholesale division could not have placed the order direct with the manufacturing division.

Mr. DOBEY. I will cover that now.

Q. Can any retailer, any retailer in the United States who wishes to buy McKesson products on an order in excess of \$1,000, submit that order direct to the manufacturing division and have it filled?

A. There is a lot of things that might cause it not to be filled, so I can't answer that question.

Q. Well, the answer is no, then; not any retailer can do that?

A. I didn't say it was no. I said there are so many other factors, that I can't answer the question.

Q. Are those the factors we discussed before?

A. It seems to me we covered it.

Q. Whether the retailer was a desirable account for the manufacturing division?

A. I think we have a right to sell for any or for no reason, so I have no reason.

Q. And you would not sell McKesson products to any retailer—

A. I wouldn't say that.

171 Q. (Continuing.) Who submitted an order in excess of \$1,000?

A. I wouldn't say that; no, I won't say that; that is not what I said.

Q. That is not your practice, is it, to sell to any retailer who submits an order to the manufacturing division in excess of \$1,000?

A. It is what?

Q. It is not your practice to do that?

A. What does that mean legally [to counsel]?

Q. I mean you do not do that?

A. Is that so?

Q. Do you?

A. I don't know of an instance where it has happened, so I can—

Mr. EHRHARDT: I would like to object to it on the grounds that I think the witness is being confused. I think the witness testified before, which is true in accordance with market practices, that it just does not happen that a retailer sends in an order for \$1,000.

The WITNESS. I can honestly say that we have never turned one down.

172 Q. You have never turned an order down from a retailer that was in excess of \$1,000.—

A. Because of practice. That was your question, you said practice, because we have not had any, to my knowledge.

Q. You mean that no retailer has ever submitted direct to the manufacturing division an order in excess of \$1,000?

A. Not to my knowledge, so I don't know—when you say what we do—we did not do anything, because it has not occurred.

Mr. EHRHARDT. Could we go off the record just a minute.

(Discussion off the record.)

Q. You do get orders in excess of \$1,000, of course, from your direct retailer contracts?

A. That we do, yes.

Q. And that is a frequent occurrence?

A. Oh, yes.

Q. Did this extra five percent discount on orders in excess of \$1,000 filled by the manufacturing division—did that exist at the time the complaint was filed in May of 1952?

A. Yes.

Q. How long have you had that five percent extra
173 discount in effect?

A. Well, six months after the Robinson-Patman bill became a law.

Q. What was it prior to then; was it more than that?

A. I don't remember the actual terms at that time.

Q. Does a retailer buying McKesson products direct from the manufacturing division receive or enjoy any advantage over a retailer purchasing McKesson products from a wholesale drug division or from an independent wholesaler?

Mr. SULLIVAN. Wait a minute? We have already shown you that some retailers, if their orders are in excess of \$1,000, get the five percent discount. And he has already testified that other retailers who purchase direct from the manufacturing division are sold at the same prices that they would be charged by a wholesale division or by an independent wholesaler.

Mr. DOBEY. Right.

Q. Do the direct buying retailers receive any advantage other than the five percent on quantity orders?

A. No.

Q. From the time the complaint was filed on May 27,
174 1952, until the present time, has there been any change in that five percent discount on quantity orders on direct sales?

A. Well, you are not stating the case right yet; it isn't five percent.

Q. Five percent over and above the other discounts.

A. If you will now state your question again.

Q. Has there been any change with respect to the allowance of the five percent additional discount on orders over \$1,000, from the time the complaint was filed in May of 1952 until the present time?

A. No.

Q. Has the quantity limitation or the quantity requirement changed any during that time?

A. It has not changed since the Robinson-Patman law was made effective.

Q. Does the manufacturing division do any purchasing of drug products on behalf of the wholesale drug divisions other than ingredients of McKesson products?

Mr. SULLIVAN. Wait a minute. That assumes that they do some purchasing on behalf of the drug divisions.

Q. Does the manufacturing division do any purchasing of drug products on behalf of the wholesale drug divisions?

175 A. No.

Q. Does the manufacturing division sell drug products other than McKesson products direct to retailers?

A. The manufacturing division?

Q. Yes.

A. No.

Q. I would like to direct your attention to the first sentence of Interrogatory 19 of the supplemental interrogatories—

Mr. SULLIVAN. You mean of the answers?

Mr. DOBEY. No, the question first, and then we can follow with the answers.

Q. We ask you to state whether the manufacturing division solicited orders for McKesson Products—

Mr. SULLIVAN. I am sorry, what—

Mr. DOBEY. Of 19, of the supplemental. Have you got the supplemental?

Mr. SULLIVAN. I have it, thank you.

Q. (Continuing.) Whether the manufacturing division of McKesson solicited orders for McKesson products from any retailers from whom any of the wholesalers listed in the Annex to Item 8 solicited orders. And then the first sentence of the answer

176 19 to that interrogatory is: "Yes, but except for orders received from retailers to whom the manufacturing division sold directly, the orders would have been turned over to wholesalers located in the territory where the officers or employees worked."

Where the order is obtained by a salesman of the manufacturing division, on what basis do you decide whether to turn that order over to a wholesaler of McKesson products in the territory or to make a direct sale of McKesson products by the manufacturing division to the retailer?

Mr. SULLIVAN. Now, wait a minute. I have to object to that question. Your question is addressed to a wholesale division. This says that orders are turned over to wholesalers located in the territory where the officers or employees work. It doesn't say turned over to the wholesale divisions.

Mr. DOBEY. No; I didn't mean to say that; I don't think I did.

Mr. SULLIVAN. Well, in your subsequent question, you followed it up on what basis you turn them over to wholesale divisions.

Mr. DOBEY. I will rephrase it.

Q. On what basis did the manufacturing division of McKesson decide whether to turn over such orders to wholesalers of McKesson products in the territory, or to make a direct sale of McKesson products by the manufacturing division to the retailer?

177

Mr. SULLIVAN. That was answered in the interrogatories, that question. The answer was: "Yes, but except for orders received from retailers to whom the manufacturing division sold directly, the orders would have been turned over to wholesalers located in the territory where the officers or employees work."

You are asking the same question as that answered in that interrogatory.

Mr. DOWDY. No; the answer may be the same, and I suspect it is, but the question is not.

Q. This is where a salesman goes out, of the manufacturing division, and he gets an order from a retailer. Now, how do you decide whether you are going to turn it over to a wholesaler?

A. Well, the retailer decides that. In other words, the customer has a lot of privileges, you know; he can decide where he wants to buy and usually does; that is the practice. If he says he wants to go to Jones or Brown or Smith, he goes to Jones, or Brown or Smith. The decision is entirely with the purchaser.

Q. Supposing he indicates no preference?

A. You are supposing something that never happens.
178 so I can't answer that. That hasn't come up.

Q. If your manufacturing division salesman obtains an order from a retailer in a trading territory where there is a wholesale drug division, and also an independent wholesaler, does your answer still apply: The order goes wherever the retailer says he wants it to go?

A. Wherever the retailer says he wants it to go.

Q. And is your statement there also true: You have never heard of a case, you have never had a case, so far as you know, where the retailer did not have a preference?

A. My answer is still the same. I have never heard of that with us or anybody else, where the retailer doesn't know who he wanted it through.

Q. Are your manufacturing division salesmen under any instructions to endeavor to persuade the retailers upon whom they call to buy direct from the manufacturing division rather than—

A. No; they are not. The persuasion is to buy. The first thing that we have got to do is to convince somebody that they want our merchandise. After that, they have the decision as to where it comes from. That is a practice that is as old as the hills, and the simplest thing. In other words, you have a choice of the drug-store you go to, and you go over there.

179 Q. Didn't you state earlier that your manufacturing division salesmen as far as possible, avoid calling on retailers that are also called upon by salesmen of your wholesale drug divisions?

Mr. SULLIVAN. You were talking in that question about those salesmen who solicit the retail accounts of the manufacturing division.

Mr. DOBEY. Yes.

Mr. SULLIVAN. You were not talking about the salesmen who are otherwise employed by the manufacturing division.

Q. You stated with respect to salesmen who solicited retail accounts for the manufacturing division, that so far as possible, you try to avoid their calling upon the same retailers called upon by salesmen of the wholesale drug division?

A. We try to avoid such duplication as much as possible.

Mr. SULLIVAN. Or by any other wholesaler, isn't that true?

The WITNESS. That is true; that is true.

Q. Now, with respect to the last statement, if there is a wholesale drug division and an independent wholesaler in the same trading territory—strike that. I understand your qualification.

Mr. SULLIVAN. Well you see, you keep talking about the wholesale.

Q. You state that they endeavor to avoid calling upon retailers who are called upon by either the wholesale drug division or an independent wholesaler; is that correct?

A. That is correct. In other words, our man that goes in to see People's in Washington, never sees anybody else but People's; that is his job. So he doesn't run into this condition that you are talking about.

Q. You don't know that an independent wholesaler in Washington also tries to sell People's?

Mr. SULLIVAN. To the extent that we know, of course.

The WITNESS. Well, I don't know that. Buyers don't tell you everything.

Q. Do you endeavor to avoid having your salesmen call upon retailers in the same trading territory as independent wholesalers?

Mr. SULLIVAN. Which salesmen?

Q. Any salesmen of the manufacturing division.

A. Now, wait a minute; let's start over again.

181 Mr. THURN. Could we go off the record for a moment?

Mr. DOBEY. Yes, sure.

(Discussion off the record.)

Q. Manufacturing division salesmen who solicit retailers for a direct sale by the manufacturing division are not instructed to avoid retailers who might be solicited by independent wholesalers; is that correct?

A. They are not instructed to avoid?

Q. Yes.

A. I don't know how to interpret that.

Q. Well, I will state it affirmatively: Your manufacturing division salesmen do solicit retailers for direct sale by the manufacturing division, who are located in the trading territories of independent wholesalers, do they not?

A. Well, now, I have got to—that needs qualifying. Let's go back to—You try to simplify a question, and I will simplify one for you. You mentioned People's in Washington. The man that sells People's in Washington travels out of Connecticut. He goes down there once out of every six weeks. When he is through, he comes back. They have a warehouse that has an entirely different function than all the others in town.

Q. Where is People's warehouse?

182 A. It is in Washington, I suppose.

Q. By the way, do you ship all People's McKesson products to People's in Washington?

A. To their warehouse, not to individual stores.

Q. We got off the track, and I will try to get on it again, and take an illustration.

A. No; that kind of a salesman is different; that fellow does not go around to all the retailers. So, when you say "try to avoid," I don't know what you mean. He just doesn't go to these at all.

Q. Well, take Philadelphia; you sell to the Shoemaker & Busch, a wholesaler, Smith, Kline & French, a wholesaler, and Kruhn Wholesale Drug, Philadelphia.

A. That is right.

Q. Those are all wholesalers who buy direct from the manufacturing division?

A. That is right.

Q. Do you also solicit orders from a retailer in that area for direct sale by the manufacturing division?

A. Sun Ray Drug; yes.

Q. Does Sun Ray Drug operate a chain of retail drugstores?

A. They do.

Q. What is their territory generally?

183 A. Well, Philadelphia and that area immediately adjoining there in Philadelphia. They are the same type of operations that People's are in Washington.

Q. What is the territory of People's in Washington, generally?

Mr. SULLIVAN. To the extent that you know, of course.

The WITNESS. Well, as far as I know, I don't know where they are located a hundred percent. I just know their main offices and that is where we do our main business with them.

Q. Do you know generally where their retail operations are?

A. No; if I knew that I would be the best posted drug man in the world. I don't know where they have all got stores.

Q. Approximately how many direct retail buying accounts does the manufacturing division have?

Mr. SULLIVAN. You mean at the present time or—

Mr. DOBEY. At the present time.

The WITNESS. At the present time, I would have fifteen or sixteen.

Q. Fifteen or sixteen?

A. Yes.

184 Q. I would like to direct your attention to Answer 2, the first sentence of Answer 2 to the set of interrogatories.

Mr. SULLIVAN. Will you wait until I get them, please?

Mr. DOBEY. Yes, sure.

Q. This sentence reads: "None of the wholesalers to whom the manufacturing division of defendant sold McKesson products competed with the manufacturing division."

Is not that answer incorrect, in view of the sale of McKesson products by the manufacturing division direct to retailers located in the same trading area as independent wholesalers to whom the manufacturing division sold McKesson products?

Mr. SULLIVAN. No, that answer is—

Mr. DOBEY. I asked the witness.

The WITNESS. I don't know. I don't know what that—

Mr. SULLIVAN. That calls for a conclusion, too.

The WITNESS. I don't know.

Mr. SULLIVAN. Again you are raising the question as to whether the manufacturing division is in competition with the wholesalers when they sell to retailers. We claim we are not. We give you the facts, we state what the facts are. We tell you 185 that we sell to wholesalers, we tell you that we sell to retailers. We tell you the areas in which we sell to retailers and we tell you the areas in which we sell to wholesalers.

Now, whatever conclusion you want to draw from those facts is your prerogative.

Mr. DOBEY. The question is whether you are also in competition.

Mr. SULLIVAN. You are asking him whether an answer to an interrogatory is correct; it calls for a conclusion.

Mr. DOBEY. You made the answer—

Mr. SULLIVAN. And we maintain it is correct.

Q. You state here that none of the wholesalers to whom the manufacturing division sold McKesson products competed with the manufacturing division; that is your answer.

Mr. SULLIVAN. That is right.

Q. Now, isn't that incorrect, when you bear in mind that the manufacturing division sells direct to retailers such as these—this Sun Ray Drugstore in Philadelphia—and you also sell to wholesalers in that same area? Now, aren't you competing with those wholesalers?

186 Mr. SULLIVAN. We say no.

Q. What is your answer?

A. We say no.

Q. What do you say?

A. I say no.

Q. With respect to your direct sale to retailers, are all orders from a particular customer shipped to one location?

A. I can't answer that.

Q. In the case of People's, you said that was true?

A. Well, that is supposed to be absolutely the case. But when you say, could it occur otherwise, there could be a drop shipment, should they want something mailed.

Q. To one of their retail stores?

A. An individual item, I don't know. That happens to every drug manufacturer in the world.

Mr. SULLIVAN. There are, of course, occasions when any customer of any manufacturer asks for drop shipments.

The WITNESS. That is right.

Mr. SULLIVAN. To be made at different places.

The WITNESS. Some are needed for a certain place quick, and they ask for it by telephone; I would never hear of it. And
187 to sit here and say it didn't happen—it happens to all drug manufacturers.

Q. So that on occasion—

A. I just can't answer that, period.

Q. Haven't you already said that it does happen, that you do it occasionally?

A. I say it could happen.

Q. You say it could happen, and you don't say it did happen?

A. I say it could happen, and I say it does happen. It is a practice for me to rush something by mail; well, what are you going to do? You are going to take care of it, if you have to get out of bed to do it.

Q. And you would ship to a particular retail store instead of to the warehouse?

A. Not as a general practice, as an exception.

Q. As an exception?

A. Yes; if it was an emergency of some kind, we would do anything to please the customer.

Q. Do you have any discounts applicable, depending upon whether the shipments goes to one location, or whether the shipment goes to a variety of locations; in the case of your direct buying retailers?

A. Well, that comes under your Robinson-Patman bill, and it is so set up on that basis.

188 Q. I am asking you whether you have a different discount applicable to these direct buying retailers dependent on whether you ship to one location or to several locations.

A. Well, we ship to one location; that is our practice.

Q. If you did make one of these emergency shipments, there is no different discount; is that correct?

A. You mean a dollar's worth of something?

Mr. SULLIVAN. That depends upon the facts of each particular order.

The WITNESS. What I would do generally in a practice like that, if People's called for one item, we would give it to them. It wouldn't be a question of whether they got twenty off or five off or two off. There is nothing illegal about that. If they have an emergency, that is what generally happens, so would most any other pharmaceutical house.

Q. I am simply asking if you have a different discount structure.

Mr. SULLIVAN. If I understand the question, it is this: Are the discounts that McKessons gives determined in any way upon the place or area of shipment?

189 Mr. DOREY. Whether the shipments go to one location, or whether they go to retail stores at a number of locations owned by one concern.

The WITNESS. Well, they go to one place, only, to get these discounts. We would not make, in the case of People's, delivery to every store as a practice, and give them the same discount that they get by doing their job themselves out of their own warehouse. So it goes to their warehouse, and where it lands from there, we don't know. They perform that function.

Mr. THURN. Off the record.

(Discussion off the record.)

Q. With respect to the five percent additional discount on orders over \$1,000, which we have discussed at some length, what is your reason for granting that additional discount?

A. For the reason that that single location performs exactly the same function that a wholesaler would in getting from his warehouse into a retail outlet.

Q. And on that type of transaction, you feel that the retailer is entitled to something for performing what you consider a wholesale function?

190 A. That is right. Robinson-Patman felt that that is in line with their bill and approved the practice.

Q. You mean it is permissible under the Robinson-Patman Act?

A. That is correct.

Q. Are you basing that five percent on the fact that you have less freight cost because it all goes to one location?

A. To us?

Q. Yes.

A. Our handling cost and the savings of the distribution. In other words, we don't have the cost of the individual shipments where you absolutely have a higher freight rate, you have express, and there is a dozen things that enter into what the costs are to get merchandise to a given place. So we don't put a requirement on it; if you shipped everything parcel post, well, you would soon go broke on that basis.

Q. I would like you to direct your attention to the fact that retailers whose purchases aggregated less than \$50 were excluded from—Annex to Item 19 of the answers to the supplemental interrogatories—

Mr. SULLIVAN. Well, let's see what Interrogatory 19 is, and what the answer is.

Interrogatory 19 of the supplementary interrogatory?

191 Mr. DOBEY. Yes.

Q. It says excluded from the list—this is the list [handing document to the witness]—are retailers whose purchases aggregate less than \$50. And that is the list of customers to whom the manufacturing division made direct retailer sales, whose addresses are believed to be located in the probable trading areas of the wholesalers listed in the Annex to Item 8. That is the answers in the first set of interrogatories.

This is it, if you would like to see the answers annexed to Item 8 [handing paper to the witness].

A. Which is annexed to what?

Q. Annexed to Item 8 is a list of wholesalers whom you say are not in competition with wholesale drug divisions of McKesson.

Mr. SULLIVAN. We don't say that.

The WITNESS. We don't say that at all.

Mr. DOBEY. Well, whose trading territories do not overlap the trading territory of the wholesale drug division, isn't that true?

Mr. SULLIVAN. We say that this Annex to Item 8 is a list of the wholesale drug accounts of the manufacturing division who are located in trading areas, as to which we believe there is

192 no competition with any wholesale drug division.

Mr. DOBEY. That is right. Now, then you list the retailers in Annex to Item 19, who, you say, are located in the probably trading areas of the wholesalers listed in Annex to Item 8.

Mr. SULLIVAN. Because of their addresses.

Mr. DOBEY. Yes. Now, then, you said excluded from the list are retailers whose purchases aggregated less than \$50.

Q. Now, my questions are solely designed to clear up that matter of exclusion from the list of retailers whose purchases aggregate less than \$50. How many retailers approximately would you have on this Annex to Item 19 if you did include retailers whose purchases aggregated less than \$50, direct buying retailers?

A. I couldn't answer that, because as a practice, I don't think there are those who make a practice of buying from us in quantities that small.

Q. Well, the thing—

A. When you say how many more, I haven't any idea.

Q. The thing I don't understand, and perhaps you can give me some light on it, is that I thought that your manufacturing division, generally speaking, sold to retailers who purchased in quantity?

193 A. That is right.

Q. And yet, here, apparently, there is a list of retailers from the manufacturing division whose purchases were less than \$50 for an entire year.

Mr. SULLIVAN. Your interrogatory asked for the names of retailers in the period from June 30, 1950, to July 1, 1951, who were located in trading areas of the Annex to Item 8, wholesalers to whom the manufacturing division sold directly in that area. And in answer to that question, we submitted this list, Annex to Item 19, but excluded from it those retailers whose purchases were less than \$50. This was not intended to be the retail accounts of the manufacturing division who are listed regularly by the manufacturing division and to whom the manufacturing division sells regularly.

It includes those, and also other retailers to whom the manufacturing division might have sold in that period of time.

Mr. DOBEY. It includes all those who did, in fact, buy during that period of time?

Mr. SULLIVAN. It includes all retailers who did, in fact, buy from the manufacturing division in that one-year period, 194 excluding only those *who* who bought in quantities of \$50 or less.

Mr. THURN. Off the record for a moment.

(Discussion off the record.)

Mr. DOBEY. First I asked him how many there were, and he said he didn't know. And my next question was, in substance: Isn't it true that the manufacturing division, generally speaking, sells only to retailers who buy in quantity?

Q. And you said that was true?

A. That is true.

Q. Now—

Mr. THURN. Off the record.

(Discussion off the record.)

Mr. THURN. The answer is that these retail men would often go around with wholesale representatives and there might be products that the wholesale representatives just don't have in stock or don't handle. Some of those people don't handle a full line, they handle particular products, and some of these retailers want other products that wholesalers in the area don't handle.

Mr. DOBEY. That would be true, you mean, with respect to salesmen who were soliciting?

195 Mr. THURN. For this other class of salesman, who were detailing it, and they might go in the retail store, and the wholesaler might not have the stock to fill the order.

Mr. DOBEY. Why don't you put that on the record?

The WITNESS. I can give you an illustration—

Q. Let me give you a question: Would you explain how it comes about that there are retailers purchasing direct from the manufacturing division, whose purchases in that period aggregated less than \$50 for the entire period?

A. Yes, sir. The answer to that is that in many areas our wholesalers don't carry every item which we manufacture. If a druggist wants those items, and he can't get them from his wholesaler, then as an accommodation, we ship them, rather than to have him be without. And that is an actual occurrence that happens to any manufacturer. But we don't solicit that business. That is actually sent to us because the other fellows want it.

Again, we would go broke trying to solicit \$20 a year customers to do business with. We just couldn't do it. But neither can we refuse, when we are interested in getting our products to the public, even if we lose money on an occasion to see that they have it. That is our right, and it is what we should do as an aggressive manufacturer.

196 Q. Those orders would be obtained by the second group of salesmen who are not soliciting orders for direct sale?

A. Either that, or it happens this way: That a retailer would order them from his supplier, and when the invoice came in, these are the items he couldn't get, but he wants them, so he sends up to us and says, "We can't get them from the wholesalers," and we know that, so we pack them up and away they go. But they don't get any twenty percent on it.

Q. The salesmen who solicit orders for direct sale by the manufacturing division do not contact retailers whose probable purchases are going to be small?

A. That is right.

Q. I would like to call your attention to Paragraph 4 of the complaint. There we say the defendant is one of the largest

wholesalers of drugstore merchandise in the United States, "operating through more than seventy divisions located in 35 states. It conducts a nationwide business dealing in wholesale drugs, pharmaceutical, surgical and medical supplies, toilet articles and sundry other items customarily sold in drug stores."

And then Paragraph 4 of the answer says, "We admit the 197 allegations in Paragraphs 4 and 5, with the explanation that the conduct of its business as a wholesaler," and so on—what I am directing your attention to, is the implication—perhaps it is more than an implication—from Paragraph 4 of the complaint and your admission in your answer, I get the impression that you are admitting that you conduct a nationwide wholesale drug business. Now, is that true?

Mr. SULLIVAN. I suggest that perhaps you hold that question for Mr. Nolen, who is more familiar with the operations of the wholesale drug business. Mr. Dewell is simply in charge of the manufacturing aspects.

Mr. DOBEY. All right.

Q. Does the manufacturing division solicit direct retail contracts for sale by the manufacturing division on a nationwide basis?

A. It seems to me the answer to that is yes; if I understand the question correctly, we are definitely national manufacturers—international.

Q. Approximately how many different drug items are manufactured by McKesson?

A. Well, there is—

Mr. SULLIVAN. The list of those was attached to the interrogatories.

198 The WITNESS. And there is always this confusion:

Do you mean individual products or the sizes?

Q. The list of them, not the sizes.

A. By the time you get into sizes, there are three hundred or four hundred, or more. There are 225 individual items.

Mr. SULLIVAN. But for a more accurate number you can count them.

Mr. DOBEY. I am interested only in the approximate number. I am not concerned whether it is 225 or 224.

Q. Now, I call your attention—

Mr. SULLIVAN. May I ask what annex that is?

Mr. DOBEY. Annex to Item 9.

Q. I call your attention to a clause on this Annex to Item 9, which says, "Merchandiser, be sure to check Dealer's stocks on all items listed below," which is the list of items [handing document to witness].

In that connection, is a——

A. Yes, "Be sure to check dealer's stocks"——

Q. Is a retailer buying direct from the manufacturing division required to carry a complete line of McKesson products?

A. The requirement is that they do have a full representative line. Now, for me to say that they won't be out of some item sometime would be looking too near to perfection, because we don't work that way on this number of items.

Q. I wasn't referring to being temporarily out of stock on an item, but are they required to carry a complete line?

A. No; it is not a requirement that they have everything that we make.

Q. Is there any requirement that they carry any definite percentage of the total number of items that you make?

A. No. The requirement is that they buy according to the amounts that—if they bought one item, well, then in the category of the discount schedule, they would get the discount, anyone of 225.

Q. Do you ask a direct buying retailer, before you sell him direct, if he will carry a full line of McKesson products?

A. Well, let me answer it this way: We try very hard to have them carry a full line, but we don't always succeed.

Q. Do you undertake to get a commitment for him to carry a full line?

200 A. Yes, we do.

Q. Are you successful?

A. In some instances only, but there is no premium offered for that.

Q. Is a retailer buying direct from the manufacturing division required to submit to any inventory inspection by a McKesson salesman?

MR. SULLIVAN. You mean a regular retailer account?

MR. DOBEY. A retailer buying direct from the manufacturing division, yes.

MR. SULLIVAN. You are not talking about the \$50 retailer?

MR. DOBEY. No.

MR. SULLIVAN. Well, let's confine it then to the retailer you are talking about. Are you talking about the retail accounts to whom the manufacturing division sells regularly and directly?

MR. DOBEY. Yes, that is right.

THE WITNESS. And the question was——

Q. Is such a retailer required to submit to an inspection of his stock, of his inventory of McKesson products by one of your salesmen?

A. Is he required to?

201 Q. Yes.

A. No.

Q. Is a wholesaler purchasing McKesson products from the manufacturing division required to carry a complete line of McKesson products?

A. The answer to that is no, that is not a requirement.

Q. Is he required to carry any definite percentage of your total number of products? This is a wholesaler.

A. No.

Q. Or, do you have a set of requirements which a wholesaler must meet in order to buy McKesson products direct from the manufacturing division?

Mr. EHRHARDT. Excuse me, did you say wholesaler?

Mr. DOBEY. Yes, I am on wholesalers now.

The WITNESS. Do we have any requirement that they must fulfill in order to buy from us?

Mr. DOBEY. Yes.

Mr. SULLIVAN. That is rather a broad question. "Any requirement"—he has got to be a wholesaler and he has got to be in good standing.

Q. Well, enumerate the requisites that you have.

202 A. I think the first answer would be, do we need him in that community to be sure that our customers get the service; that is the first question we would ask ourselves. Then if we do need him, well, how badly do we need him? From that point it goes on. In other words, do we need him? If we don't need him, all the requirements in the world don't answer the question.

Q. Also, assuming you need him and want him, do you have any requirements that he must meet before you will take him?

A. No; I think if he is a dealer in good standing in the community, that is normally being sold by other manufacturers, we would probably go along and use that as a measure of whether we would or won't. If he is generally accepted as an account of that character, and who is all right, why, that would be—we would follow the practice of the industry.

Q. I was interested in your statement that the primary question is, do you need him.

A. That is right.

Q. How does it come about that you sell to wholesalers, independent wholesalers in the same trading territory as wholesale drug divisions of McKessons?

A. I think that would be answered by the need.

203 Q. Do you mean that your own wholesale drug division is not sufficient to meet the needs of the area in that respect?

A. I think that would be the answer.

Q. What would be the deficiency that would be involved?

A. Well, lack of contact with the retailers. My guess, and this is only a rough guess, right here in this island that we are sitting on, called Manhattan Island and Brooklyn, there is around 3,500 to 4,000 druggists, and we need all of the wholesalers that we have listed here, in order to see that they are serviced. No wholesaler in New York calls on all of them, you can be sure of that. And to what extent, I can't tell you, but none of them call on all of them; it takes all of them to get the solicitation in a market like this, from the east side to the north side, and everywhere else, so we do need them.

Q. Do you mean in particular areas, for example, in Philadelphia; your wholesale drug division could not cover the retailers in that area?

A. Krull down there, as I remember, years ago, covered less than twenty percent of the retailers in the town, so what are you going to do, you are going to sell—it gets back to need, it depends upon our requirement.

Mr. SULLIVAN. May I ask a question: Does McKesson have a wholesaler in Philadelphia?

204 Mr. DOBEY. Three independent wholesalers.

Q. You don't have a wholesale drug division—

A. No.

Q. What about Pittsburgh?

A. Well, we have a wholesale division there.

Q. And you have an independent wholesaler?

A. That is right.

Q. Does a wholesaler buying McKesson products direct from the manufacturing division buy McKesson products at a lower price than a wholesaler buying McKesson products from a McKesson wholesale drug division?

A. Let me see if I got that. Does a wholesaler buying direct from us buy for less than they would buy from a wholesale drug division?

Q. Yes.

A. Whether it be McKesson or any others?

A. No, your own wholesale drug division.

A. They would buy for less, buying direct from us.

Q. Than they would from your wholesale drug division?

A. Yes.

Q. How much less?

A. Let me see. I think the areas where they supply them on the courtesy basis, I think they supply them at 16 $\frac{2}{3}$ % from list. And if we sell them direct, we sell them at 25 off list.

Q. Is there any other advantage, to your knowledge, to a wholesaler in buying direct from the manufacturing division rather than buying from one of your wholesale drug divisions?

A. Well, that answers itself. They are in business for profit, and of course, they take advantage of that situation.

Q. Is there any other advantage that you know of?

A. No; I don't know of any other.

Q. Does a wholesaler buying direct from the manufacturing division get a better price from the manufacturing division than a direct-buying retailer?

A. Yes.

Q. What is the difference?

A. Five percent.

Q. The wholesaler gets five percent above what the direct-buying retailer gets?

A. That is right. The direct-retailer buyer who qualifies with a \$1,000 order. Now, let's keep the record straight on that.

Q. Yes. And the wholesaler would give the five percent beyond that?

A. Yes, he would get twenty-five.

206 Q. Approximately how many manufacturers are there who make a line of drug products competitive with the McKesson line?

A. Altogether too many.

Q. Well, one would be too many?

A. That is right.

MR. SULLIVAN. I don't know what you mean by line; do you mean exactly the same line?

MR. DOBEY. Substantially the same.

MR. SULLIVAN. There may be manufacturers, for instance, who manufacture competitive products that are competitive with five or six of the products that McKesson makes.

MR. DOBEY. I understand that. My question is with respect to the entire line.

THE WITNESS. Well, to have an intelligent answer, would take a ream as long as this, to get a definition of what a competitor is, but I would assume that, say a number of products produced under a given roof, would be almost a competitor of ours in any field, if that is the question?

Q. I am not going to a manufacturer producing one particular product that is competitive with your products. I am referring to a line of products.

207. A. Well, there are manufacturers that make 2,000; there are manufacturers that make fifteen. Now, the question is, are we competitors with them? I mean it is a question that you can't answer.

Q. How many would you say that you made?

A. I would say that every drug manufacturer in the country is a competitor of ours.

Q. Roughly, how many are there who carry as complete a line as your company?

A. Well, let's see. There must be ten or fifteen whose lines are much more complete than ours—at least as complete.

Q. At least as complete, or more complete?

A. And more complete. And then when we get the individual manufacturers, we have products where—and my answer still stands, we are competitive to everybody in the drug industry.

A. That makes one item competitive to yours?

A. Yes; a deodorant, or powder that are nationally competitive or known.

Q. Are there any drug manufacturer competitors who operate their own wholesale drug divisions?

Mr. SULLIVAN. If you know.

208 The WITNESS. Well, I don't know. It would have to be sectional, and to that point I don't know. I don't know of any national, so the point is I don't know.

Q. You don't know of any national manufacturer who sells across the nation?

A. That is right. That is another question that Mr. Nolen can answer better than I can.

Mr. DOBEY. Off the record.

(Discussion off the record.)

Q. Do you know of any drug manufacturer, competitors of McKesson, who operate their own wholesale drug divisions and also sell their products to independent wholesalers?

Mr. SULLIVAN. I object to that question. It assumes that the manufacturing division of McKesson operates wholesale drug divisions. If you want to, ask the question, do you know of any other company that operates a manufacturing division and also a wholesale division:

Mr. DOBEY. I think McKesson—

Mr. SULLIVAN. You said "manufacturing division"—do you know of any other manufacturing division.

Mr. DOBEY. No; I said are there any—well, I will preface it rather than go back to it.

Q. Do you know of any other company, other than
209 McKesson, that operates both a manufacturing division and a wholesale drug division, and sells its manufactured products both through its wholesale drug divisions and through other wholesalers, independent wholesalers.

Mr. THURN. Excuse me, you mean in this particular industry?

Mr. DOBEY. Yes; the drug manufacturing industry.

Mr. SULLIVAN. If you know.

The WITNESS. I don't know.

Q. Throughout your answers to the interrogatories, you have referred to the sale of McKesson products by the manufacturing

division of McKesson to the wholesale drug divisions of McKesson. Why do you refer to these intercompany transfers of McKesson products as sales, when the manufacturing division and the wholesale drug divisions are all part of the same corporation?

Mr. SULLIVAN. I object to that question. It certainly calls for a conclusion, and it is based on statements that are not correct. You will have to rephrase your question if you want it answered.

Mr. DOBEY. Do you mean if he answers the question over your objection?

Mr. SULLIVAN. Yes; I do object.

Mr. DOBEY. I think the question is quite clear.

210 Mr. SULLIVAN. It is not; you are assuming something, and from that conclusion you ask a question.

Mr. DOBEY. Well, isn't it a fact that throughout the interrogatories—

Mr. SULLIVAN. It is a fact that throughout the interrogatories the reference is made to the fact that the manufacturing division sells to the wholesale division.

Mr. DOBEY. Sells McKesson products.

Mr. SULLIVAN. McKesson products, that is right.

Q. Now, why do you refer to those intercompany transfers—

Mr. SULLIVAN. Now, there, "intercompany transfers," I object to that. Why do you refer to those transactions as sales, if that is your question.

Mr. DOBEY. My question was all right as it is.

Q. Why do you call those sales?

A. Well, that is a matter of interpretation. In my language they are sales.

Q. Why do you define them as sales?

A. Because I don't know of any other word that fits it.

211 Mr. SULLIVAN. The question was asked and answered in the interrogatories. You asked, if I remember correctly, in the interrogatories, whether the wholesale drug divisions pay for the merchandise they obtain, and if so, by what methods and means, and you got your answer.

Q. Do the manufacturing division and the wholesale drug divisions maintain separate banking accounts?

A. Yes.

Q. Do you know whether each wholesale drug division maintains a separate banking account?

Mr. SULLIVAN. If you know.

The WITNESS. That is a question.

Q. You don't know?

A. I don't know, I wouldn't.

Mr. THURN. I think you do know. You may not realize that.

Mr. DOBEY. Off the record.

(Discussion off the record.)

Q. As a director you probably approve opening and closing new bank accounts?

A. Yes; that is right.

Q. When you ship McKesson products to a wholesale drug division, does the wholesale drug division send you a check to pay for the products?

Mr. SULLIVAN. That question was answered in the 212 interrogatories.

Mr. DOBEY. I want to know how the check reads.

The WITNESS. I don't know.

Q. Haven't you ever seen one of the checks from the wholesale drug division, if you get a check?

Mr. SULLIVAN. The answer to the interrogatories stated that the check was sent to the home office of the defendant.

Q. I want to know how does the check read, that is my question. How does the check read—pay to the order of whom?

Mr. SULLIVAN. If he knows.

The WITNESS. I don't know.

Q. You don't know? Is that not simply the case of the company taking money out of one pocket and putting the money in another pocket?

Mr. SULLIVAN. That calls for a conclusion. I object to that. Don't answer it.

Mr. DOBEY. I think he has already answered it.

Q. Didn't you say no?

Mr. SULLIVAN. You can draw whatever conclusions you want. Why don't you ask that question of Mr. Nolen.

213 Mr. DOBEY. Well, I will, but I thought I could get it from Mr. Dewell. He gets the checks.

Mr. SULLIVAN. He gets the checks from the wholesale divisions?

Mr. DOBEY. Received by the manufacturing—

Mr. SULLIVAN. Where does it say that the interrogatories?

Q. Does the manufacturing division get the checks?

A. You have got the answer here. The procedure is in the answers here, that is exactly how it operates.

Q. Does the manufacturing division get the checks?

Mr. SULLIVAN. You mean checks from whom?

Mr. DOBEY. The wholesale drug division.

Mr. SULLIVAN. The answer is the checks were sent to the home office of the defendant for the reason that after the manufacturing division bills the wholesale drug division, the manufacturing division transfers the accounts receivable to the home office. The manufacturing division, of course, charges the home office for the amount of receivables so transferred to the home office. Proceeding in this manner simplifies the necessity of sending mul-

multiple checks by the various divisions, since there are other charges which the wholesale divisions have to pay to the home office.

214 Many bills are sent by the manufacturing division to the wholesale divisions, but bills of sales are not customary in the drug industry?

O. Are all McKesson products manufactured at Bridgeport?

A. Let me see. I am trying to think of one exception—there is one exception—with the exception of one item. And that is peroxide, hydrogen. We don't have a plant, it is bottled for us, and it is bottled under our label. That is clearly Food & Drug, so we are distributors of that rather than manufacturers.

Q. From Bridgeport, are McKesson products sold and shipped across state lines to wholesalers and retailers located throughout the United States?

Mr. SULLIVAN. That was also answered in the answers to the interrogatories, I believe.

Mr. EHRLHARDT. Well; the answer is yes.

Mr. SULLIVAN. Yes; the answer is yes.

Q. Are those interstate shipments a day-to-day occurrence with the manufacturing division?

A. Yes.

(Whereupon, at 12:00 noon, a recess was taken to 1:00 P. M.)

215

AFTERNOON SESSION

FEBRUARY 10, 1955, 1:00 P. M.

WILBUR E. DEWELL, resumed.

Examination by Mr. DOBEY (continued):

Q. I inquired as to the number of salesmen for the manufacturing division who solicited direct retail accounts and my recollection is that I did not ask you how many salesmen you had who solicit retail orders for filling by independent wholesalers or by wholesale drug divisions, approximately.

A. Well, around thirty-eight to forty, somewhere.

Q. Thirty-eight or forty?

A. Yes.

Q. I would like to show you Annex to Item 9, which is a list of McKesson items, and showing Fair Trade prices, and ask you who gets the discounts shown under the heading "Terms" there [handing document to the witness]?

A. These go to retailers.

Q. Those are the discounts to the retailers?

A. That is right.

Q. And are those Fair Trade Prices for the independent wholesalers as well as your own wholesale drug divisions?

A. Well, is that a question of law?

Q. I didn't think so, no. Are those the Fair——

216 A. Those are the published terms.

Q. Published wholesale prices?

A. That is right.

Q. And are those applicable both to your wholesale divisions, and your independent wholesalers?

A. Yes, that is right.

Q. Now, the quantity order five percent additional discount allowed to direct buying retailers is not a part of your Fair Trade price system, or Fair Trade price schedule, is it?

A. (to counsel.) Have you got the full sense of the question? I don't know that I have it——

Q. Well, I will ask you that again, because——

A. Well, the reason I raised the question whether it is a legal question or not is that our direct accounts are not wholesalers, so I am confused on the question.

Mr. SULLIVAN. You mean your direct retailers?

The WITNESS. Our direct retailers are not wholesalers, so I can't understand what you are——

Q. What I am saying is: These prices here, these discounts apply to your wholesale drug division sales to retailers?

A. That is right.

Q. And to the sales of independent wholesalers?

217 A. That is right.

Q. But the five percent discount, additional five percent to direct retailers on quantity orders over \$1,000, that is allowed only by the manufacturing division?

A. That is right, to the——

Q. To the direct buyers?

A. To the direct buyers where they have their own warehouse.

Q. You do not permit the independent wholesalers to allow that additional five percent discount on sales to retailers, do you?

A. (to counsel.) Is there a ceiling over which Fair Trade is not effective?

Q. I meant in Fair Trade states.

A. Well, I am talking, too, about Fair Trade states.

Mr. EHRHARDT. Well, yes; the answer is yes, your question to me.

The WITNESS. That the Fair Trade does apply, the \$1,000, because that is not a wholesale transaction, that is what I am trying to—that is a retail transaction. And the retailer is Fair-Traded that retail.

Q. I will try to ask it a different way: If an independent
218 wholesaler sells an order in excess of \$1,000 to a retailer, he is required by your Fair Trade agreement to observe those discounts shown on Annex to Item 9, is he not?

A. Well, it would be, if such a thing occurred, but I just don't believe it ever has.

Q. But that is the fact, isn't it, that he would be—

A. If it occurred; yes.

Mr. SULLIVAN: Isn't that all academic; the fact of the matter is that it just doesn't happen?

The WITNESS: Yes; it just doesn't happen.

Q. And you are, therefore, selling to your direct buying accounts at a price below the price which you permit your independent wholesalers to sell to retailers, are you not?

Mr. SULLIVAN: On what accounts?

The WITNESS: That again is a—

Mr. DOBEY: Retailers.

Mr. SULLIVAN: You mean retailers who purchased in quantities of \$1,000 or more?

Q. Retailers who buy direct from the manufacturing division in quantities over \$1,000, you sell to such retailers at prices lower—

A. I gave you the discount at which we sell them, of course.

219 Q. The answer is yes; isn't it?

A. Yes.

Mr. SULLIVAN: He has answered that question.

Q. I would like to direct your attention to the last sentence of Answer 14 to the supplemental interrogatories, which refers to sales of McKesson products by wholesale drug divisions of McKesson to other wholesalers, and it states: "Purchases by these wholesalers from the various wholesale drug divisions were insignificant, and were principally of a courtesy nature to enable the wholesalers to fill demands they had for McKesson products."

Will you explain what you mean by "sales of a courtesy nature"?

A. Well, I think perhaps that question, too, could be answered better by Nolen, because in some areas I remember in the past—I don't know now, and I wouldn't want to be quoted, but off the record, if you want to take it that way, I will give it to you, my opinion on it—

Q. The difficulty is, that is your language, because you supplied the information on those first two sets of interrogatories. Now, if you wish to tell me now that your information came from Mr.

Nolen, I would be glad to reserve my question.

220 Mr. SULLIVAN: Well, of necessity, Mr. Dewell was not personally familiar with all the details of the information you requested in your interrogatories, and much of that information had to be obtained from other sources in the company.

The information was obtained and passed on to Mr. Dewell and was incorporated in the answers.

Now, that particular question that you are asking has to do entirely with the operations of the drug divisions as such, and if I may make a suggestion, I suggest that it be reserved until Mr. Nolen is here.

Q. Did your information on the subject come from Mr. Nolen?

A. As far as I know, yes. This thing is two and a half years old, or three years old now, and I haven't read it.

Q. I am afraid that I cannot drop the subject entirely, because apart from the interrogatories, I have Exhibit 6, which is a letter which you wrote [handing document to the witness], to wholesalers which purchased McKesson products in your wholesale drug divisions.

A. Being a strictly legal question, on this—

Q. You wrote that letter?

221 A. I signed this letter and studied it over, and worked it out in accordance with the legal phase that seemed to be available to us under Fair Trade.

Q. In the second paragraph, this letter says, "You have in the past secured your McKesson manufactured products from one of our authorized distributors and in turn have supplied your retail accounts, so that you may continue this practice."

Doesn't your language there, the language of "practice," indicate to you that these wholesalers were purchasing McKesson products from your wholesale drug division on a regular customer basis?

Mr. SULLIVAN. I think it is clear from our answers to your interrogatories, that the wholesale drug divisions do sell to other wholesalers.

Q. Isn't it clear, from your language here, that they purchase on a regular customer basis? Do you want to read it [handing document to the witness]?

A. Well, if they purchase at all.

Mr. SULLIVAN. What constitutes a regular customer?

The WITNESS. Yes, what constitutes a regular customer? I can't answer that.

Q. It is not a mere purchase, is it? It is not a mere courtesy sale, is it?

A. In many cases, I would think so.

Q. Well, what is your definition of a "courtesy sale"?

222 A. Well, my definition, entirely apart from wholesaling, or any otherwise, is that I have something that I have that a customer needs, and I let him have it or no as I decide, out of courtesy.

Q. You mean it is considered a part of the definition that the wholesaler is not buying the item for stock purposes?

A. That is what I would indicate it as, yes; that he picked it up and sent it out immediately without even putting it in his own stock.

Q. Well, don't you think that your language here, referring to the practice of securing McKesson manufactured products "from one of our authorized distributors" indicates here that—

A. I have no—

Mr. SULLIVAN. Don't you think, Mr. Dobey, that the document speaks for itself? It says: "You have in the past secured your McKesson manufactured products from one of our authorized distributors; and in turn, have supplied your retail accounts, so that you may continue this practice," and the practice referred to obviously is the practice in the past of securing McKesson manufactured products from one of the authorized distributors.

223 Q. Isn't it the implication—

Mr. SULLIVAN. I object to any question with respect to an implication.

Mr. DOBEY. His implication.

Mr. SULLIVAN. The exhibit speaks for itself.

Q. Was it not your intention to refer to the practice of wholesalers buying McKesson products for stock purposes from wholesale drug divisions?

Mr. SULLIVAN. I object to that question. It speaks for itself. It says, "You have in the past secured McKesson manufactured products from one of our authorized distributors," and it goes on to say, "So that you may continue this practice," meaning, of course, the practice of securing McKesson manufactured products from an authorized distributor. That does not mean that they would secure it for stock purposes or that they secure it solely for the purpose of filling an order already obtained, or for the purpose of filling anticipated orders.

The WITNESS. Or using it for their own personal use.

Mr. SULLIVAN. For whatever purpose they buy, and have bought from an authorized distributor, the letter was simply directed to enable him to continue that practice, whatever their purpose might be.

224 Q. Was your information as to the practice obtained from Mr. Nolen or from the wholesale drug divisions?

A. Well, I don't remember that. I actually don't remember.

Q. Was it based on information obtained from someone else other than your own knowledge?

Mr. SULLIVAN. Yes; of course it was.

Mr. DOBEY. I asked him. I didn't ask you.

The WITNESS. If you ask me where the source of information was, I don't know.

Q. You don't remember?

A. That is the truth.

Q. Do you remember that it was not based on your own personal knowledge?

A. Based on my personal knowledge that it might have happened once or many times, I don't know. I want to be as co-operative as I can, but I am simply not putting my foot in my mouth here on things—the letter, as I see it, is subject to interpretation by judges and by attorneys, and it stands for itself.

Q. I want your interpretation. You wrote it.

A. I wrote it. You can interpret it. There it is, you can interpret it as you see fit.

225 Q. Well, when you refer to a wholesaler sale as being principally of a courtesy nature, what would be the nature of those sales that were not of a courtesy nature? Would it be for stock purposes?

A. That could be for stock, or for a demand item, where they had to have it to fill an order. It has all the meanings that all the drug industry has. If you know the definition of that, you have got your answer.

Q. In the last sentence of Answer 14 to the supplemental interrogatories, you state that, "Purchases of McKesson products by other wholesalers from the wholesale drug divisions of McKesson were quite insignificant."

Mr. DOBEY. Have you found that, Mr. Sullivan?

Mr. SULLIVAN. Yes.

Q. Now, in the third sentence of Answer 18 of the supplemental interrogatories, you say: "It is believed that for any year, including the period July 1, 1951 to June 30, 1952, the aggregate sales by the wholesale drug divisions to other wholesalers, would amount to about \$200,000."

Now, I ask you if you consider \$200,000 worth of sales of McKesson products as insignificant; and if you do, why do you consider them insignificant?

A. Maybe the word was—

226 Mr. SULLIVAN. Wait a minute, you are asking the question out of context. It was stated that the purchases by the wholesale divisions—the purchases by other wholesalers from the various wholesale divisions were insignificant, and were principally of a courtesy nature to enable wholesalers to fill demands they had for McKesson products. And then it was stated in Answer 18 that the amount for all the wholesale divisions amounted to around \$200,000 in any year.

Now, how you want to interpret the word "insignificant" depends upon—

Mr. DOBEY. Depends upon factors—

Mr. THURN. The word "insignificant" applies only to each wholesaler, not to the aggregate, in the context of the interrogatory.

Mr. DOBEY. Well, you do not—I got the contrary impression there, Mr. Thurn. But if that is your statement of what it intended to imply, I will accept that.

Mr. THURN. Well, the interrogatory speaks for itself.

Mr. SULLIVAN. As worded in the interrogatory, the answer is correct; the answer as worded indicates that the purchases were insignificant, and that is all we pointed out.

227 Q. Well, you don't consider the aggregate of \$200,000 worth of sales as insignificant, do you?

A. I don't even know what "insignificant" means, now, by this time.

Q. Do you consider \$200,000 worth of—

A. I would consider, if I were a manufacturer and I had only \$200,000 worth of manufacturing the business in the United States, I would get out. And that is what the whole thing refers to, because in a sense, a manufacturer couldn't live with a \$200,000 volume. So you can call it insignificant, or unimportant, or whatever word you want to use, but no manufacturer would stay in business.

Q. But it is not to be sneezed at.

A. Well, it isn't a thing I would go out and work for. Maybe that answers it.

Q. What is the source of your belief that sales of this character would amount to about \$200,000 for the period in question?

A. I have forgotten where we turned to to get our information at that time. This is back in—this went back to—I would have to have time to look it up to see who I contacted to bring it up to date.

228 Mr. SULLIVAN. I think it is quite obvious that the information upon which that was based was obtained from the wholesale drug divisions who submitted their figures as to the sales they made to other wholesalers in that one-year period.

The WITNESS. Well, he asked who gave it to me, that is, an individual.

Mr. SULLIVAN. Do you mean the person who passed it on to him?

Mr. DOBEY. Where he got it, the source.

Mr. SULLIVAN. If I may be permitted to answer that question, it was obtained from information derived from the wholesale divisions.

Q. Does McKesson impose any restriction upon the territory within which are the retailers to whom independent wholesalers of McKesson products may sell such products?

A. No; we do not.

Q. Do you ask independent wholesalers of McKesson products to refrain from soliciting orders from retailers to whom you sell direct?

A. No.

Q. Do you request independent wholesalers of McKesson products to refrain from soliciting orders for McKesson products from any particular retailer or any particular class of retailers?

A. No.

229 Q. Now, I direct your attention to Exhibit 2 [handing document to the witness]; and I also direct your attention to Exhibit 6 [handing document to the witness], and I believe the interrogatories show—the answer to the interrogatories shows that Exhibit 2 was sent to those wholesalers to whom the manufacturing division sold direct?

A. That is correct.

Q. And Exhibit 6 was sent by the manufacturing division to those wholesalers who purchased McKesson products from other wholesalers?

A. That is right.

Q. Now, there is a time lag there between—Exhibit 2 went out on June 1st, and Exhibit 6 went out on June 8th, and what was responsible for the time lag on those two exhibits?

A. My answer to that is that this was a very important subject at the time, this whole Fair Trade subject, and we employed what we thought was the best counsel in the country to help us, to advise us what to do in something that we believed in, Fair Trade, so this is a much more intelligent surmise than mine.

Q. Well, at the time you sent out Exhibit 2, is it correct that you did not know the wholesalers to whom the wholesale drug divisions were selling McKesson products?

230° A. That is true, we did not know.

Q. The manufacturing divisions did not know, you did not know?

A. That is correct, we did not know.

Q. Now, at or about the time that you sent out Exhibit 2—that is the first one—the one you sent to the wholesalers who purchased from the manufacturing division, did you request Mr. Nolen or someone at the wholesale drug divisions to send you a list of the wholesalers to whom the wholesale drug divisions of McKesson sold McKesson products?

A. Yes. We didn't have it, and we couldn't send this out unless we got it from some source. I don't know whether it was Nolen—this was all sent out from our office, and we requested the list because that list was necessary, at the advice of our counsel, that they should be covered.

So, the only way we could cover them was to get some evidence to make the list.

Q. At the time you sent out the first exhibit, Exhibit 2, did you know that the wholesale drug divisions also sold McKesson products to other wholesalers?

A. Yes, I did; but I didn't know who they were.

231 Q. Now, who made the decision to adopt the form of manufacturer-wholesaler Fair Trade Agreement which is attached as Exhibit A to the first set of interrogatories?

A. Our counsel.

Q. What officer of the company, or officers of the company, approved that form?

A. This form, after being passed on by the counsel?

Q. Yes.

A. I did.

Q. You did?

A. Yes. Counsel said, "This is it, and as near as we can advise you how to keep Fair Trade effective on your products."

Q. Did you discuss the matter with Mr. Nolen before you adopted that form?

A. No; we did not.

Q. Did he participate in the decision to use that form?

A. I don't know; not with me, he didn't.

Q. Before you adopted the form, had the form already been approved by the president of the company?

A. The president of the company and our counsel and myself worked this out and moved as fast as we could in the protection of our rights under Fair Trade at that time.

Q. To try to maintain Fair Trade prices after the Schegmann decision.

232 I believe you may have answered this question: Referring to Exhibit 5, the second sentence [handing document to the witness]: "Send Mr. Dewell at Bridgeport a list of wholesalers."

A. That is right.

Q. Did you request Mr. Nolen to furnish you with that list?

A. Well, we requested the wholesale division to supply it.

Q. Did Exhibit A, manufacturer-wholesaler Fair Trade agreement represent the form of manufacturer-wholesaler Fair Trade agreement in effect on May 2, 1952, when the complaint in this case was filed?

A. I don't know.

Mr. DOBEY. Would counsel be willing to stipulate that it was?

Mr. SULLIVAN. I will stipulate that Exhibit A was the form of manufacturer-wholesaler Fair Trade agreement used at the time this action was commenced.

Q. Now, my next question is: Was this form, including Paragraph 3, still in effect at the time the answer was filed on September 6, 1952?

A. I don't know.

Mr. SULLIVAN. I can't answer that.

233 Mr. DOBEY. Well, Mr. Sullivan, maybe if I direct your attention to Paragraphs 22 and 23 of the answer—

Mr. SULLIVAN. Wait until I get the answer.

Mr. DOBEY. You call attention to the enactment of the McGuire Act, and you point out that this act contained a new provision permitting agreements "requiring the vendee to enter into contracts or agreements prescribing minimum or stipulated prices."

Does that help you to recall whether Exhibit A was in effect at the time the answer was filed?

Mr. SULLIVAN. Well, I will say this: Exhibit A was replaced as a result of and shortly after the enactment of the McGuire Act. Now, if this Exhibit A form of contract was still in existence when the answer was filed, it was certainly in the process of being replaced.

Mr. DOBEY. Your answers are not clear enough to help me. Maybe I can ask a few more questions, and then-maybe we can leave it as a stipulation.

Q. When was Paragraph 3 of Exhibit A deleted from your manufacturer-wholesaler form of Fair Trade contract?

Mr. SULLIVAN. Just a minute, please. I think Mr. Ehrhardt submitted an affidavit in opposition to your motion for summary judgment.

234 Mr. DOBEY. Yes, but he didn't state at what date the new form of contract was employed by McKesson.

Mr. EHRLHARDT. That certainly can be ascertained.

Mr. SULLIVAN. Yes, that can be ascertained. I think it is quite clear that with the enactment of the McGuire Act, this third paragraph of the Exhibit A contract became unnecessary.

Mr. DOBEY. Well, I am afraid it is not quite clear.

Mr. SULLIVAN. And new contracts were either in the process of being prepared or were prepared shortly after that.

Mr. EHRLHARDT. There is something right in the papers—

Mr. DOBEY. On the form which is attached to Mr. Ehrhardt's affidavit, there is the notation, "Form W-4/53." That is the new form.

Q. Does this No. 4/53, up here at the top, does that indicate the date that form was adopted [handing document to the witness]?

A. Form W-4/53. That would be—

Q. Does that indicate the date that form was adopted?

A. I don't know. [To Counsel.] Do you know?

235 Mr. EHRHARDT. Oh, I think so. Now, whether there was one before that, we would have to check. 4/53, that is April '53. What is the date this form went out?

Mr. DOBEY. Well, would you mind checking, and then we will put the exact date in the record.

Mr. EHRHARDT. I think it is a question of fact. Let's stipulate that it is a question of fact.

Mr. DOBEY. When we examine Mr. Nolen—

Mr. EHRHARDT. Well, I don't think it is for Mr. Nolen—this is a Bridgeport thing. Let's get that—that would be the date when the McGuire Act contract went out.

Mr. DOBEY. The date you eliminated Paragraph 3?

Mr. EHRHARDT. Yes.

Q. Now, who made the decision to eliminate Paragraph 3 from this form of contract, from the manufacturer-wholesaler Fair Trade contract?

A. It was made on the advice of counsel. We just answered it. It seems to me that the McGuire Act changed the whole legal aspect of it, and things were moving so fast we just couldn't do anything else but follow the advice of counsel. And I hope we had good counsel.

236 Q. At the time you did decide to eliminate that Paragraph 3, you of course knew that this lawsuit was pending, did you not?

A. I don't remember that. I don't remember whether the lawsuit—against—

Q. Against McKesson.

Mr. SULLIVAN. We will stipulate that at the time the change was made, this lawsuit was pending.

Mr. DOBEY. To the knowledge of the—

Mr. SULLIVAN. Well, naturally it was to the knowledge of McKesson & Robbins.

Are you trying to create the inference, however, that it was changed because the suit was pending? If you are trying to create that, I will tell you no, that it wasn't changed because of the pendency of this law suit.

Mr. DOBEY. You are not on the witness stand, so I will ask some questions of Mr. Dewell.

Q. At the time Paragraph 3 was eliminated, you knew that the government's suit against McKesson was pending in the courts, did you not?

A. No; I did not.

Q. You did not?

A. No; as I recall now, no; I didn't associate the two in any way, shape, or form.

237 Q. Did you know that a suit had been filed against McKesson?

A. I don't know that I did, actually, no.

Q. Was the elimination of Paragraph 3 first approved by the president of the company?

A. It was approved by counsel.

Q. Before you approved it, was it approved by the president of the company?

A. I don't recall.

Q. Prior to eliminating Paragraph 3, did you discuss the effect of the elimination of that paragraph on this suit against McKesson with any officer of McKesson?

Mr. SULLIVAN. What was that in reference to suit?

Mr. DOBEY. Did he discuss the effect of the elimination of this paragraph on this suit with any officer of McKesson?

The WITNESS. No, I did not.

Mr. SULLIVAN. You mean Paragraph 3 of the contract involved in this suit?

Mr. DOBEY. Yes.

Q. Has McKesson brought any suits to enforce Fair Trade Prices, suits against retailers or wholesalers who were cutting the Fair Trade Prices?

A. I don't recall any.

238 Q. Are you aware that the courts of Florida and Michigan have held that Fair Trade Laws are valid as to signers, but unconstitutional as to non-signers?

Mr. SULLIVAN. I object to that; that is a legal question, and calls for a legal conclusion. As to what the courts of the State of Florida have decided is something—

Mr. DOBEY. Well, it goes to the question of the mootness of this provision because you have got states in which you cannot get anybody except signers, so you can't contend that you drop Paragraph 3, because now in the McGuire Act we can get them as signers, because you can't get a lot of them as nonsigners.

Mr. SULLIVAN. But your question is directed as to whether or not the Fair Trade statutes of certain states allow certain things to be done.

Mr. DOBEY. I am asking him as to what his knowledge of the matters is.

The WITNESS. Well, my knowledge is limited from the legal angle.

Q. Are you aware that there are states in which you can—

A. Not Fair Trade.

Q. (Continuing.) You can Fair Trade as to signers, but not as to nonsigners?

239 A. No; I don't think those states—

Q. Well, do you know that there are such states?

A. I know there are states where there is no Fair Trade, which are Missouri and Texas.

Q. Do you know that there are now states where you can legally Fair Trade as to people who sign an agreement, but you can't Fair Trade to nonsigners?

Mr. SULLIVAN. Assuming there are such states.

The WITNESS. I don't know.

Q. You don't know?

A. If you asked me those states, I couldn't enumerate them.

Q. In deciding to remove Paragraph 3 from your manufacturer-wholesaler Fair Trade agreements, were you influenced to any extent by the fact that this lawsuit was pending?

A. To the best of my memory, no.

Q. In your answers to the interrogatories, you stated that you discontinued Fair-Trading in Georgia, following the decision of the Supreme Court in Grayson-Robinson Stores, Inc. v. Oneida, which was decided on February 24, 1953. On January 6, 1954, a new Fair Trade law became effective in Georgia. After January 6, 1954, did you resume Fair-Trading of your products in Georgia?

240 Mr. SULLIVAN. If you know.

The WITNESS. I don't know.

Mr. THURN. Mr. Dobey, before you ask your next question, could you suspend for a few minutes; I have to make a phone call.

Mr. DOBEY. Surely.

(Short recess taken.)

Q. Did you still Fair-Trade your products in Michigan?

Mr. SULLIVAN. Mr. Dobey, we have stated in our answers to the interrogatories that McKesson & Robinson Fair Trades in every state where Fair Trade is permissible, in the manner and to the extent where Fair Trade is permitted. Does that answer your question?

Mr. DOBEY. No; the question is "Are you?", and "To what extent?"

The WITNESS. I don't know.

Q. You don't know whether you Fair Trade your products in Michigan?

A. I would state that we do if the law permits us to.

Q. Well, that does not answer my question. I have the same question with respect to Florida, Utah, and Nebraska.

241 A. I can't answer that.

Mr. SULLIVAN. May I direct your attention to the provisions of the contracts themselves, which provide that Fair Trade agreements apply to each and every sale, to the extent that the agreement is lawful under the Fair Trade Act of the state in which the sale is made.

Mr. DOBEY. That is a nice clause, but that still does not answer the question of what you are doing in any of these states.

Mr. SULLIVAN. Are you inferring that we may be Fair-Trading contrary to the laws of these states?

Mr. DOBEY. You may say the law is one thing after you have a lower court decision, and you have got nonsigners and signers. I don't know what you are doing in each state. But this witness cannot answer that question, so we will have to undertake to get the information another way.

Mr. SULLIVAN. I question the relevance of the whole line of inquiry. That is not the theory upon which your complaint is based, that we are violating the Fair Trade laws of any state. The theory of your complaint is that we are violating the Sherman Act in that we do not come under the exceptions provided 242 by the Tydings-Miller Act. That is the issue before this court. The issue before this court has nothing to do with whether we may or may not be violating the laws of any state, but we will take that up at the appropriate time.

Mr. DOBEY. We would like to get that information, and I suggest that you consider it.

Mr. SULLIVAN. We will think about it.

Mr. THURN. What states are those?

Mr. DOBEY. Florida, Michigan, Georgia, Utah, Nebraska. And in each state would be the question of whether you are Fair-Trading as to both signers and nonsigners, and in each state the question of when you quit Fair-Trading as to either signers or nonsigners, or both.

Q. I would like to direct your attention to the last sentence of Exhibit 7, which is a letter you wrote to wholesalers who purchase direct from the manufacturing division, and you conclude the letter by saying, "We wish again to emphasize the opportunities which you now have to make sales of our merchandise based on the dealer gross profit protected as it is by Fair Trade agreements."

Now, the Fair Trade agreements you referred to at that 243 time were these manufacturer-wholesaler form of agreement, Exhibit A?

A. No; it was the retailer Fair Trade. We are talking about the gross profit to the retailers, that was protected by the retailer Fair Trade prices.

Q. You are referring to the retail dealers Fair Trade?

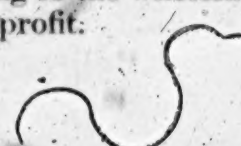
A. That is right.

Q. Well, your letter is to wholesalers.

A. I know, but they sell to the retailers. That was a very popular subject at that time.

Q. You are not referring to the wholesalers' profit?

A. No, to the retailers' profit.



Q. The wholesalers' profit is protected by your wholesaler Fair Trade agreements, too, isn't it, in that other wholesalers can't undercut?

A. No; that is not what this letter is about.

Q. But my last statement is true, is it not, that wholesalers' profit is protected—the independent wholesalers' profit is protected by the Fair Trade agreements, in that some other wholesaler cannot undercut?

A. That is the result.

Q. And when you enter into those Fair Trade agreements, you, also protect your own wholesale drug divisions from being
244 undercut by the independent wholesalers, do you not?

A. I would assume that it would have that effect, yes.

Q. At the same time, are you not protecting the manufacturing division on its sales direct to retailers, by requiring minimum prices at which the independent wholesaler can sell?

A. If that is the intent of Fair Trade, that is what we do.

Q. I am very much interested in this point that you allow direct retailers a five percent discount on quantity orders of \$1,000 or over, which the independent wholesaler cannot allow under his Fair Trade agreement. With respect to those Fair Trade agreements with the wholesalers, are you not also protecting the manufacturing division from competition on its direct sales to retailers, particularly from the independent wholesalers?

Mr. SULLIVAN. Wait a minute. I am trying to get—that is a big, long—that assumes facts which are not in existence. The manufacturing division sells direct to certain retailers, and to those retailers to whom it sells directly and who purchase in quantity in excess of \$1,000, the manufacturing division
245 allows an additional five percent discount. But you are basing your question on the assumption that these retailers would have purchased from some wholesaler rather than from the manufacturing division.

Q. The fact is that if they do purchase from a wholesaler, the wholesaler is prohibited by his agreement with you from granting them any such discount?

Mr. SULLIVAN. The fact is that they don't purchase from a wholesaler, if you want the facts.

Q. And one of the reasons is that they get that extra five percent discount, is it not?

Mr. SULLIVAN. That doesn't necessarily follow.

Q. Isn't that one of the reasons why the retailer will buy direct from the manufacturing division, to get the five percent discount?

A. Well, I can only answer it this way: I don't know what prompts you to make a purchase when you go in the store.

Q. The price is a factor, isn't it?

A. I don't know, I don't know that it is or not. If you paid \$10 for a prescription, that couldn't be the price, so I can't read the mind of a customer.

Q. If you were a retailer and could buy direct at five percent less—

246 A. I don't think it follows at all.

Q. (continuing.) From the manufacturing division of McKesson—

A. I may be six weeks away from my source of supply; then it wouldn't be worth five percent for me to lose my sales.

Mr. THURN. Mr. Dobey, there is a legal question here. You have asked Mr. Dewell questions dealing with what could be done under this wholesale Fair Trade contract, whether wholesalers wouldn't be prevented from making these sales. We really think that is a legal conclusion, and that you have asked him to make a legal conclusion as to the effect of those contracts.—

Actually, I think if you got into it, you would find that these were never intended to cover sales above \$1,000, that, in fact, wholesalers don't make sales above \$1,000, that, in fact, that determination has never been made by the company, because the issue has not been faced, and that I think that we might advise them, in that instance, that we do not believe, in view of the intention, and in view of the published price of \$1,000, that the contract covers that transaction, and that Mr. Dewell is not
247 a lawyer and qualified to answer that.

Mr. DOBEY. It is true, is it not, that the discount which the sellers publish, the net wholesale prices, which the independent wholesaler is required to follow, do not contain any provision for an additional five percent discount on orders over \$1,000, which the manufacturing division allows? There is no dispute about that, is there?

Mr. THURN. There is no dispute about the fact that it does not contain an express provision.

Mr. SULLIVAN. The reason it does not contain an express provision is that such sales are not made at the wholesale level.

Mr. DOBEY. Of course one follows another. As long as you are allowing an extra five percent discount to a retailer, it would be foolish for the retailer to go to a wholesaler.

Mr. THURN. This is a two-ended thing, too. Your wholesaler just does not have the room to make this type of sale, as a practical matter.

Mr. DOBEY. Are you telling me that none of these independent wholesalers make any sales or could make sales of McKesson products for orders in excess of \$1,000?

The WITNESS. I doubt it very much.

248 Q. That is where the five percent applies; it applies to the order?

A. That is right.

Mr. THURN. There is a question whether they could do it. This is Mr. Nolen's field, on what the wholesaler could do—

Mr. DOBEY. You mean what the independent wholesalers could do?

Mr. THURN. No; he knows the wholesaling end of the business.

Mr. EHRHARDT. I think as a practical matter, they couldn't. They couldn't have enough merchandise in the warehouse.

Q. What area of solicitation, what geographical area do your salesmen of the manufacturing division—

A. I have given you that this morning.

Q. I am asking now with respect to the salesmen who are soliciting, not for direct accounts, but for the wholesale drug divisions.

A. All over the United States.

Mr. SULLIVAN. You say for the wholesale drug divisions; you mean for all wholesalers?

Q. All wholesalers, that is right.

A. All wholesalers, not just any segment of it.

249 Q. They cover the entire United States?

A. That is right.

Mr. DOBEY. Those are all the questions I have.

(Short recess taken.)

Mr. SULLIVAN. I am afraid we have reviewed the field and boiled our cross-examination down to about one or two questions.

By Mr. SULLIVAN:

Q. Mr. Dewell, isn't it a fact that McKesson never contemplated its wholesale Fair Trade prices to apply to any wholesaler who might obtain an order for McKesson products in excess of \$1,000?

A. That is correct.

Q. Have you ever heard of a retailer purchasing in excess of \$1,000 of McKesson products from any wholesaler?

A. No; I have not.

Mr. SULLIVAN. That is all.

By Mr. DOBEY:

Q. Did you not state that your own wholesale drug divisions would not grant or could not grant that five percent discount to a retailer?

Mr. SULLIVAN. He stated that they would not because they never were faced with the problem.

250 The Witness. That type of order just does not exist.

Q. Don't your wholesale drug division observe the same Fair Trade prices that the independent wholesalers observe?

A. That is right.

Q. Do you ever allow that list—

Mr. DOBEY (to Mr. Sullivan). This may be more in the nature of new matter rather than following your cross examination—

Q. (Continuing.) That five percent discount to direct buying retailers on an order that is less than \$1,000?

Mr. SULLIVAN. I object to that question as not proper redirect examination. But if the witness can answer it, I—

The WITNESS. I am not sure that I got it—

Q. What I mean is, in selling direct to retailers; do you invariably insist upon the order being in the amount of \$1,000 or over before allowing the five percent?

A. Before allowing the full discount, that is right, on the direct basis?

Q. Yes; you insist on it?

A. Yes, that is right.

Q. Does that \$1,000 order have to go to one location?

251 A. That we have answered before.

Mr. SULLIVAN. That has been answered before.

Q. The answer is yes?

A. Yes.

Q. Have you ever advised the independent wholesaler of McKesson products that their Fair Trade agreements do not apply to sales to retailers where the order is in excess of \$1,000?

A. No.

Mr. EHRHARDT. What was the answer?

Mr. DOBEY. "No."

Q. Have you ever given the independent wholesalers any instructions as to what their prices should be on any sales other than the Fair Trade prices which appear in the Annex to Item 9?

A. Oh, this schedule here, in fact, contains what we gave them to sell from.

Q. And that is all you have ever given them, what is contained in the Annex to Item 9?

A. That is correct.

By Mr. SULLIVAN:

Q. Isn't it a fact, Mr. Dewell, that all of your wholesale customers are aware of your practices of selling direct to retailers?

252 Mr. DOBEY. I object to that. How can he testify as to the knowledge of his wholesale customers, unless—

Mr. SULLIVAN. I will rephrase the question.

Mr. DOBEY (continuing). Unless he sent them some instructions?

Q. Do you know of your own knowledge whether the wholesalers are aware of the prices and the price discount granted to the various groups of purchasers by the manufacturing division?

Mr. DOBEY. I object that unless you lay the foundation to show some basis as to what the source of his knowledge on that subject would be.

Q. Would you answer the question, please?

A. The answer would be "yes," to your question.

Mr. SULLIVAN. I have no further questions.

By Mr. DOBEY:

Q. Do I understand you to say that you know that there are independent wholesalers who are aware that McKesson gives the five percent discount to direct buying retailers?

A. Do I know of—

Q. Was that the substance of your previous testimony: That you do know that there are independent wholesalers who are aware of your practice of giving this extra five percent discount to direct buying retailers?

253 A. I would be amazed if they did not know.

Q. That doesn't answer my question. Do you know?

A. Of one? Yes.

Q. Which one?

A. I can't remember just now, but I know of one.

Q. Do you know any others?

A. No.

Q. You cannot remember the name of one?

A. No.

Q. What is the basis for your statement that you know that this one knows about it?

A. Well, let me—I will make a general statement: The wholesale drug business generally does not sell the type of retailers that we are talking about. I am not talking about anything other than the top-flight chain drug companies of this country, and every manufacturer—

Q. Sells them direct?

A. Sells them direct, pretty nearly every one, pretty nearly a hundred percent, and they also buy at a better price, and that is generally known by anybody who knows anything—

Q. In the industry?

A. (Continuing.) In the industry.

254 Q. Isn't it true that the other drug manufacturers—

A. I don't know that they—

Q. (Continuing.) Also allow an extra five percent discount to retailers?

A. I don't know what they do, it may be more or it may be less.

Q. Isn't it the general understanding in the industry that they do get an extra five percent if they buy direct?

A. Well, it is the accepted theory that that is a true statement.

Q. In the industry?

A. That is right.

Q. And you would expect the independent wholesaler to know that?

A. I would expect them to know that, or else they couldn't run their business.

Q. Why would they need to know that in order to run their business?

A. Well, I would assume that it would be necessary for them to know what went on in the industry in which they are engaged.

Mr. DOBEY. I have no other questions.

255 Mr. SULLIVAN. That concludes Mr. Dewell's deposition now. I assume that when the original transcript is prepared, it will be sent to us to be forwarded to Mr. Dewell for any corrections.

Mr. DOBEY. We may as well have this discussion off the record. (Discussion off the record.)

Mr. SULLIVAN. Signing of the deposition is waived, with the understanding that after we review our copy, if we have any corrections to make, we will note those corrections on our copy and advise you of them, so that you can note the corrections on your copy and also on the original.

Mr. DOBEY. All right.

Mr. SULLIVAN. All objections as to relevancy, competency and materiality are reserved to the trial.

(Whereupon, the examination in the above-entitled matter was adjourned sine die.)

256 UNITED STATES v. McKESSON & ROBBINS, INCORPORATED

List of Corrections To Be Made in Mr. Dewell's Deposition

p. 19, l. 9—last word should read "premises."

p. 22, l. 2 from bottom—delete "At the time."

p. 23, l. 4 from bottom—change "hasn't" to "has."

p. 33, l. 8—next to last word should read "account"; l. 11, last word should read "account."

p. 34, l. 13—fourth word should read "account"; l. 17, sixth word should read "business."

p. 36, l. 6 from bottom—"nee" should read "net."

- p. 53, l. 6—last word should read "accounts."
- p. 57, l. 7 from bottom—first word should read "accounts."
- p. 62, l. 15—last three "ofs" should be changed to "off."
- p. 65, l. 3 from bottom—"contracts" should read "accounts."
- p. 67, l. 13—change "contracts" to "accounts."
- p. 107, last line—add "judgment" after "summary."
- p. 114, l. 11—delete "signed" and add an "s" to "Trade."
- p. 117, l. 4 from bottom—change "intent" to "result."
- p. 421, l. 1—delete "and."

258 United States District Court, Southern District
of New York

Deposition of Herman C. Nolen

Filed May 16, 1955

[Title omitted.]

Examination of Defendant by HERMAN C. NOLEN, taken on behalf of plaintiff on Thursday, March 24, 1955, at 9:45 A. M., at the United States Court House, Foley Square, New York, New York, pursuant to notice, before Marvin P. Birnbaum, Notary Public in and for the State of New York.

APPEARANCES

Trial Attorneys for the Government: Allen Doby, Esq., John Hughes, Esq., Hodges, Reavis, McGrath, Pantaleoni & Downy (20 Pine Street, New York, N. Y.), Attorneys for Defendant, By John P. McGrath, Esq., Denis B. Sullivan, Esq., and Lawrence C. Ehrhardt, Esq., of Counsel.

259 HERMAN C. NOLEN, called as a witness, having been first duly sworn by Marvin P. Birnbaum, a Notary Public of the State of New York, testified as follows:

Examination by Mr. DOBEY:

Q. Would you state your name, please?

A. Herman C. Nolen.

Q. What is your position with the McKesson organization?

A. I am an executive vice president in charge of drug merchandising.

Q. Are you head of the wholesale drug division?

A. Just the drug merchandising as such.

Q. You are excluding the liquor wholesaling?

A. Well, I am excluding not only liquor, but the operations as such.

Q. Would you explain?

A. Surely, my field has to do with the buying and selling of merchandise; the handling of personnel in the warehouses, and labor and operation standards and so forth, would be outside of my jurisdiction.

For instance, I would not have anything to do with negotiating a labor contract; or hiring warehouse employees, and things of that kind.

260 Q. That is, you are not in charge of the actual operation of the warehouses?

A. That is right.

Q. How long have you held that position with the McKesson organization?

A. I believe I was made executive vice president in the latter part of October 1953. I think that was when there was a reorganization.

Q. Are you a member of the board of directors?

A. Yes; I am.

Q. What was your position before you became executive vice president?

A. I was just vice president. I think—now, I am not sure about the title, because that changes from time to time—but I think vice president in charge of drug merchandising.

Q. How long had you held that position approximately?

A. These titles are a little hard to remember, but approximately since 1950, and prior to that time, I was vice president in charge of drug buying.

Q. Do you have with you Item 1 of the subpoena duces tecum, a copy of the seller's published net wholesale prices for McKesson products in effect on May 27, 1952?

A. I don't know.

261 Mr. McGRATH: We will produce it. The witness stands mute.

Mr. SULLIVAN. I produce this price list [handing document to Mr. Dobe].

Mr. DOBEY. This is the same as Annex to Item 9 of our first set of interrogatories; is it not, Mr. Sullivan?

Mr. SULLIVAN. What is the date of that?

Mr. DOBEY. This is revised October 1st.

Mr. SULLIVAN. Yes.

Mr. DOBEY. First, would you mark this document as Exhibit G8.

(Photostat marked "Exhibit G8" for identification, as of this date.)

Q. My question is: Under the terms, it says, "Line extensions of less than \$4 in original shipper indicated" with an asterisk; what does that mean?

A. Well, I think it requires two definitions, one of a "line extension," and the other of "a shipper." A line extension is an order line. The value of the line extension is computed by taking the unit price of the item times the number of items.

Q. The same item?

A. The same item. Are you clear on that?

262 Q. Yes.

A. There is a shipper?

Q. It says "an original shipper."

A. That is a shipping case; that is a packing. That is what the merchandise is shipped in. For instance, some merchandise is shipped in a shipping container and packed six to a case; some maybe twelve to a case; some may be a gross to a case, and that would be a shipping container, where you can ship—what we would call a shipping case.

Q. And if the item is an item that is marked with an asterisk, and the buyer buys less than \$4 of that item, of that single item, but it is in the original shipper, he gets ten percent off list, is that right?

A. It has to be \$4, as I understand. Read that to me again.

Mr. McGRATH. Read it yourself. It is right there under terms, the first line.

The WITNESS. It means that the value would have to be more than \$4 of that line extension before the discount would apply. If it were under \$4, it would not be subject to that discount.

Q. Look at the next line, Mr. Nolen. That says, "Line extension of \$4 or over, ten percent off list."

263 A. This one here is so blurred I can't read it.

Q. Take this one [handing document to the witness].

A. I see; "Line extensions of less than \$4 in original shipping container." Any shipping container then, would be subject to the ten percent discount, and on the next line, it says that any line extension of \$4 or more would be subject to the ten percent discount.

Q. Whether it was in the same shipping container or not?

A. That is right.

Q. Did those discounts apply to the column headed "List"? He gets ten percent off list? Does that apply to that last column [indicating]?

A. Let me see—this is the first time I have ever looked at this (examines document).

That is the list price, \$7.40 is the list price.

Q. On the column before you get to the list price, you have "Minimum." What does that "minimum" represent? Is that the minimum resale price or retail price?

A. As I said, this is the first time I have ever read this. I would think that that refers to the fair trade minimum price.

Q. Of the retailer?

264 A. The retail price of the product.

Mr. DOBEY. Can you help Mr. Nolen out on that?

Mr. EHRHARDT. Yes. The answer is yes.

Mr. DOBEY. The column labeled "Minimum" is the retail fair trade price?

Mr. EHRHARDT. That is right, retail fair trade minimum price.

Mr. DOBEY. All right.

Q. Now, before you get to that column, it says, "Shipper Shelf Retail Full." What does that mean?

A. I imagine that would refer to the full list price of the product, that the list price is one thing, and the fair trade minimum is—

Q. Another?

A. Something else, usually less, or always less, I would think.

Mr. DOBEY. Can you confirm that?

Mr. EHRHARDT. I can confirm that that is generally true in the industry.

The WITNESS. I am pretty sure that that is what this means.

Q. In other words, for one pint of Alba-Gar, the full list price would be a dollar and ten cents?

A. That is right.

265 Q. And the minimum fair trade price would be a dollar, is that right?

A. That is right. That is what I would consider it.

Mr. EHRHARDT. Off the record.

(Discussion off the record.)

Mr. DOBEY. I should have left out the word "list" when I used that.

The WITNESS. Can I say this off the record?

Mr. DOBEY. Yes.

(Discussion off the record.)

Q. My next question: When we get to an order for \$100 through \$249 assorted, there is a discount of ten and two and a half percent off list. Would you explain how that is figured, or what that discount would be on an order of \$250?

A. Provided it was all—this just runs to \$249, you said?

Q. You are right. Let's make it \$249.

A. I would assume the discount would be ten and two and a half on all merchandise which was sold in line extensions of \$4 or more or in original shipping containers.

Q. My question is: How is a discount figured? This is my understanding, and I want to be sure that this is correct: The ten percent would be ten percent off \$249?

266 A. If that was the list price.

Mr. McGRATH. That is the total of the order.

The WITNESS. The total of the order? I am not too positive of this, because I never priced any orders, but I would think that is the way it is handled.

Q. Ten percent off the \$249?

A. Yes.

Q. The two and a half percent would be two and a half percent off what was left after you took off ten percent?

A. I would think so, but I am not sure. I don't think we add the ten and two and a half and make it twelve and a half. I think it is ten, and then two and a half off the balance. Again, I am not sure, because I have never been in the pricing.

Mr. McGRATH. Do you know that?

Mr. EHRHARDT. Yes; it is ten, and two and a half percent off the balance.

Mr. DOBEY. The same would be true of the ten and five off an order of \$250 or more?

Mr. EHRHARDT. Yes.

Mr. SULLIVAN. At this point, Mr. Dobey, I think we ought to advise you that that price list has recently been amended,
267 and I give you here a price list revised to March 15, 1955, together with a letter that was sent out by the manufacturing division to all wholesalers [handing document to Mr. Dobey].

Mr. DOBEY. I think I better save this until after we have completed this [indicating].

Mr. SULLIVAN. I wanted you to have it now.

Mr. McGRATH. Suppose we have it marked for identification. Then you can come back to it any time you want.

Mr. DOBEY. Would you mark this as D-1.

(Letter dated March 24, 1955, and attached price list, marked "Exhibit D-1" for identification, as of this date.)

Mr. McGRATH. Let the record indicate that the handwriting in pencil on this letter was not on all the letters that went out, and therefore, that will be regarded as being deleted from the exhibit.

Mr. DOBEY. Yes.

The second item of the subpoena called for a copy—

Mr. SULLIVAN. Of the net retail minimum prices for McKesson products published by the seller in effect on May 27, 1952. That is the same document as the exhibit that was just marked as G8.

Mr. DOBEY. In other words, this second item, the
268 net retail minimum prices for McKesson published by seller is the minimum shown?

Mr. SULLIVAN. They are set forth in the same document.

Mr. DOBEY. Now, Item No. 3, a copy of the price and discount schedule at which the manufacturing division sold McKesson products direct to retailers in effect on May 27, 1952. Is this it [indicating]?

Mr. SULLIVAN. Yes; that is it [indicating].

Mr. DOBEY. Would you mark this document as G9.

(Price and discount schedule marked "Exhibit G9" for identification, as of this date.)

Mr. DOBEY. I think perhaps you can help me, Mr. Sullivan and Mr. Ehrhardt. With respect to Exhibit G9, which is the discount schedule at which the manufacturing division sold McKesson products directly to retailers, in effect on May 27, 1952, the list price as set forth in price list dated October 1, 1951, which would be Exhibit G8, less the following discounts: "Sales in quantities of \$1,000 and over—single shipment to one point—20% off list."

Are you sure that that is a flat twenty percent off the list, or is it a ten, five and five?

269 Mr. EHRHARDT. My understanding is that it is a flat twenty percent off list, and not ten, five and five.

Mr. DOBEY. The reason I asked that is because Mr. Dewell's testimony indicated to me that it was ten, five and five, and I think I would like to ask you to check that specifically.

Mr. EHRHARDT. I would be happy to do so. Would you like me to do so right away, or during an adjournment sometime this morning?

Mr. SULLIVAN. We will do that and advise you.

Mr. DOBEY. Fine. Will you send me a letter on the point with the understanding that I can incorporate the letter in the record?

Mr. SULLIVAN. We will do that.

By Mr. DOBEY:

Q. Item 5 is a copy of the price and discount schedule at which the wholesale drug division of McKesson sold McKesson products to other wholesalers, in effect on May 27, 1952. Do you have that item?

Mr. EHRHARDT. Did we skip Item 4?

Mr. DOBEY. I am sorry, I have. Do you have Item 4, which is a copy of the price and discount schedule at which the manufacturing division sold McKesson products directly to wholesalers?

270 Mr. SULLIVAN. We hand you that [handing document to Mr. Dobey].

Mr. DOBEY. Would you mark this document as G10.

(Photostat of sheet entitled "Wholesaler-Retailer Fair Trade Agreement in Effect," marked "Exhibit G10" for identification, as of this date.)

Mr. DOBEY. This Exhibit G10, which is the prices on the sales of the manufacturing division direct to wholesalers, refers to discount of twenty-five percent from list. Can you tell me what list that is from? Is it from the same list that appears on Exhibit G8?

Mr. EHRHARDT. Yes, it is.

Mr. DOBEY. Would the same thing be true with respect to Exhibit G9? Is the list price referred to there the same list?

Mr. EHRHARDT. Exhibit G9 is the one headed "Price and Discount Schedule"?

Mr. DOBEY. Sales by the manufacturing division direct to retailers. The list referred to there is the same list referred to in Exhibit G8?

Mr. EHRHARDT. That is right.

Mr. DOBEY. Now, coming to Item 5, copy of the price and discount schedule at which the wholesale drug division of 271 McKesson sold products to other wholesalers.

Mr. McGRATH. It is the same as G10.

Mr. DOBEY. In other words, G10 provides for the discount?

Mr. McGRATH. Same terms whether the sale is made by a wholesale division or by the manufacturing division.

Mr. DOBEY. Except the discount is—you mean it is from the same list?

Mr. McGRATH. No; I mean the terms are the same.

Mr. DOBEY. I think you are misunderstanding it there, Mr. McGrath. To wholesalers selling to other wholesalers, it is 16 $\frac{2}{3}$.

Mr. EHRHARDT. That is right.

Mr. McGRATH. Doesn't it say so?

Mr. DOBEY. Yes, it does, but the terms to the wholesaler buying direct from the manufacturing division are twenty-five percent.

Mr. EHRHARDT. Yes, and it so states.

Mr. DOBEY. Item 5 is the same as G10; is that right?

Mr. SULLIVAN. The information requested in Item 5 is set forth in G10.

Mr. DOBEY. Item 6, copy of each form of sales agreement 272 between McKesson and Robbins and retailers buying McKesson products direct from the manufacturing division in effect on May 27, 1952.

Mr. SULLIVAN. Let us take Items 6, 7, and 8 together.

Mr. DOBEY. They are oral?

Mr. SULLIVAN. That is right.

Mr. DOBEY. There are no written agreements covering the relationship of retailer and manufacturer and wholesaler?

Mr. SULLIVAN. That is correct, excluding, of course, as you understand, the fair trade contracts.

Mr. DOBEY. Yes, and invoices and bills.

Mr. SULLIVAN. Yes.

Mr. DOBEY. Item 9, such records or summaries as show the addresses of the wholesalers to whom the wholesale drug division of McKesson & Robbins sold McKesson products during the period July 1, 1951, to June 30, 1952, and the aggregate dollar volume of such sales of McKesson products to each such wholesaler during such period.

Mr. SULLIVAN. That is being prepared. It is not ready as yet. The reason for that is that the information must come from all the wholesale divisions and there are seventy-four of them.

273 They have been contacted, and are in process of sending in their reports.

Mr. DOBEY. May we have the same understanding that you will send that to me in the form of a letter which may be incorporated in the record?

Mr. SULLIVAN. Yes.

Mr. DOBEY. Item, 10, do you have Item 10? That was the summaries or records showing the retailers to whom the manufacturing division sold direct during the same period and the dollar volume other than information already given.

(Mr. Sullivan hands document to Mr. Dobey.)

Mr. DOBEY. Would you mark this document, which has been submitted in response to Item 10 of the subpoena, as G11.

(Sheet entitled "Summary of sales made by the manufacturing division of McKesson & Robbins, Incorporated, to retail accounts during the period July 1, 1951, to June 30, 1952," marked "Exhibit G11" for identification, as of this date.)

Mr. DOBEY. Have you totaled the figures for your own information?

Mr. SULLIVAN. No, I have not.

Q. Mr. Nolen, with respect to G10, which provides
274 a price to wholesalers on orders of \$100 or more, 16 $\frac{2}{3}$ percent and prevailing discount for cash on delivery, do you know if wholesale drug divisions sell all wholesalers at that same discount of 16 $\frac{2}{3}$ percent?

A. I wouldn't know exactly. I assume that they would follow that suggested schedule.

Q. Do you know whether some of the other wholesalers who buy their McKesson-manufactured products from the wholesale drug divisions are sold at ten percent, some at fifteen percent, and some, perhaps at ten and five, instead of that 16 $\frac{2}{3}$?

A. Well, I don't know. I would assume that they would follow that schedule. If it says in \$100 lots, 16 $\frac{2}{3}$, I think that would be the discount at which they would sell. Now, if they bought less than \$100, I don't know what they would do.

Q. If they bought \$100 or more, you don't know whether the wholesale drug divisions are in fact, uniformly allowing that 16 $\frac{2}{3}$ percent to all other wholesalers?

A. I would assume that they would. So far as I know, they would be following that schedule.

Q. But you don't know?

A. No. In fact, I am very much surprised that they do much selling.

275 Q. What was that?

A. I said I am very much surprised that they do much selling.

Mr. McGRATH. The witness would not know the details of specific transactions unless they were brought to his attention.

Q. Have you issued any instructions to the wholesale drug divisions ordering them to allow the discount of 16 $\frac{2}{3}$ percent on orders of \$100 or more, to all wholesalers to whom they sell?

A. I would doubt very much whether I have issued any such order. I don't think I would ever have occasion to.

Mr. McGRATH. Well, the price list, exhibit 10, is an instruction, is it not?

The WITNESS. Yes. Well, that is not mine.

Mr. McGRATH. It emanates from the manufacturing division?

The WITNESS. That is the manufacturing division. We don't send it out.

Q. Have you given the wholesale drug divisions any authority to vary from that 16 $\frac{2}{3}$ percent in their sales to other wholesalers?

A. Not that I know of. I know of no instruction of that kind.

276 Q. Do the wholesale drug divisions sometimes ask a drug manufacturer to make drop-shipments of drug products direct from the manufacturer to the retailer, without the drug products ever going through the warehouse of the wholesale drug divisions?

A. Yes; they do.

Q. How frequently and under what circumstances are such drop-shipments made?

A. Well, there are several. First, there would be those orders that are normally handled that way, such as polio vaccine, the new polio vaccine will be handled on a drop-shipment basis, because it is dated and has an expiration date, and the terms of the manufacturer specify that that is the way this be handled.

Sales are made frequently to governmental hospitals on a drop-shipment basis in quantity on bid. These are made by the manufacturer in quantity and at our request.

Secondly, there are shorts. We may be out of stock of an item, and our retailer is in a hurry to get it. So rather than have the manufacturer ship to our warehouse and then we re-ship it to the customer, we frequently ask the manufacturer to ship directly to the retail drug store in order to expedite the delivery of that merchandise.

277 Occasionally, when we are tied up because of labor difficulties, a manufacturer may permit us to drop-ship his merchandise to customers.

Mr. DOBEY. Off the record.

(Discussion off the record.)

(The last question was read back by the stenotype reporter.)

The WITNESS. The manufacturer will allow us to sell his merchandise under a drop-shipment arrangement.

Mr. McGRATH. If you change it to that statement, that would make it clear.

The WITNESS. That is what I mean. We don't do the drop-shipping. The manufacturer does the drop-shipping, but we have to ask his permission to sell his merchandise under those terms.

Q. You bill the retailer?

A. We bill the retailer. He, the manufacturer, bills us.

Q. The manufacturer bills you?

A. That is right.

Q. Do the wholesale drug divisions sometime ask the manufacturing division of McKesson to make drop-shipments of McKesson manufactured products direct from Bridgeport to retailers without the McKesson products going through the warehouses of the wholesale drug divisions?

278 A. Frankly, I don't know, but I would doubt if it is very frequently.

Q. Why would there be that, apart from the hospital items and apart—

A. Well, there are a number of reasons. First of all I doubt if the manufacturing division would do it for us because we are asking them to perform our function of handling, packing, checking the shipment of the merchandise, and I don't think that they would continue to do it for us and give us the discount that we are presently getting.

Q. Why would your own manufacturing division decline to do that for the wholesale drug divisions, whereas other manufacturers do permit you to drop-ship under the circumstances and conditions you have indicated?

A. Well, wait a minute. They don't permit us easily. No manufacturer likes to drop-ship; generally speaking, except in the case of a thing like polio vaccine. No manufacturer likes to drop-ship because it is much more costly for him to drop-ship than to ship to us.

Q. Because of the quantities involved?

A. Well, maybe the quantity, and maybe because the shipping charges are greater, and he has to pack and ship separately, usually in small quantities. For instance, we get much of
279 our merchandise from Bridgeport in carload lots, and if

they have to drop-ship for us, of course, they lose all that—they assume the added burden of handling.

Q. Do they drop-ship for you on occasion?

A. Well, frankly, I don't know. I think it is very rarely done for us. I just don't know. I mean I can't answer that, actually.

Q. Now, I want to show you a map. This map is Annex to Item 6 of the defendant's answers to the first set of interrogatories, and it is a map which shows the location of certain McKesson wholesale drug divisions represented by green dots, and the location of "noncompetitive drug wholesalers" represented by red dots. Those red dots show the location of wholesalers listed in Annex to Item 8 of the answers to the government's first set of interrogatories.

According to Answer 8 of the answers to the government's first set of interrogatories by the defendant, the wholesalers listed in the Annex to Item 8—the ones indicated by the red dots—

A. Does that include all of them listed in Item 8?

Q. Yes, it does. There are fifteen of them, I believe. (Continuing.) Are wholesalers whose trading areas did not, to the best of McKesson's knowledge and belief, compete with 280 wholesale drug divisions of McKesson in the sale of McKesson products and other products.

A. Who said that?

Q. That is in your answers to the interrogatories.

Mr. McGRATH. Those statements were made on behalf of McKesson.

Q. Now, my question is: Does any wholesale drug division of McKesson solicit orders from retailers in any of the cities indicated by the red dots on the map?

A. Well, I would doubt if we have any salesmen covering those cities. I do not know, but I doubt if we have any salesmen going into Columbus, Ohio, or Indianapolis, Evansville, Richmond, Portsmouth, Washington, Philadelphia. But that does not mean we might not ship some merchandise there occasionally.

Q. Can you tell me positively that no McKesson salesmen of the drug divisions solicit order from retailers in any of those cities shown by the red dots?

A. That is not a simple question to answer. I am sure we do not have any regularly stationed salesmen in these areas.

Q. Do you have any stationed in Philadelphia?

A. No, we do not.

Q. Do they go in there?

A. But occasionally a man might—I mean a druggist 281 located in New York might be opening a store in Philadelphia, and he is a good friend of our salesman, and he

says, "I am opening a store, will you help me get it open?" And maybe we will get an opening order.

I don't know, I can't recall of any instance like that, but it could happen. I don't want to say that no one has ever gone in there. I know that a man has gone down to Washington occasionally to see about getting some government business, but he is not a regular salesman.

Q. I am referring to calling on retailers.

A. Yes. I do not think that we have any salesmen calling regularly in those cities. If any call is made, it is an unusual call.

Q. Can you tell me positively that you do not have any salesmen who call regularly on retailers in any of the cities shown?

A. To my knowledge, we do not. I don't know about these up here [indicating]. Up in here, those are small towns. I doubt it. You are asking me—

Mr. EHRHARDT. Excuse me. Will you identify the cities to which you referred—Scranton, Wilkes-Barre.

The WITNESS. Also, what do you consider the Scranton area?

Just the city of Scranton itself?

282 Q. Now I am confining the question to the city itself.

A. I doubt if we have any salesmen going in there.

Q. But you do not know positively?

A. I would say I could not without checking with some 1200 salesmen.

Q. Do the McKesson wholesale drug divisions solicit orders by mail from retailers located in any of those cities shown by the red dots?

A. Well, I doubt if we solicit by mail from any retailers where our salesmen did not call, except for an organization that had branches there.

For example, we sell the Sears, Roebuck store in Washington. That is mail order, but that is serviced, I believe, out of Newark. I don't think—we certainly would not have a salesman call regularly on them, but they send us an order occasionally.

But as far as retail drug stores go, I don't know of any salesmen that go into those places.

Q. By mail?

A. By mail, yes. We don't as a general rule—we can't afford to service things down in that area.

Q. What about these areas [indicating]?

A. Even Indianapolis, the order size and so forth—we would not normally call on those cities. Maybe we
283 should. I have often felt we ought to go into some of those areas, but as far as I know, we are not.

Q. You say the only way you could check that fact definitely as to whether your salesmen do call on those areas is by contacting all the salesmen?

A. Well, contacting our divisions concerned. See, our Cincinnati division moves up into this territory [indicating]; Akron and Cleveland come down. Now, I don't know whether they actually get into Columbus or not. I would doubt it.

Q. Do the wholesale drug divisions engage in any form of solicitation of orders from retailers in those cities? I have covered mail.

A. Are we excluding organizations like Sears, Roebuck and Walgreen who might have branches in other places?

Q. We are not excluding them. If you solicit their local stores—if the wholesale drug divisions solicit their local stores.

A. Well, you are going to have to give me an out on that, because frankly, I don't know whether we call in Washington, for instance, on the Sears, Roebuck store or not. I know we have shipped them some merchandise. I believe we have shipped them some merchandise, but whether the salesmen or any-
284 one goes in there or not, I don't know. I think that is handled outside of Washington.

Q. Suppose Sun Ray had a store in Scranton? Would your salesman call on the local store in Scranton?

A. I don't believe we sell Sun Ray.

Q. They are sold direct: I don't know whether the wholesale division sells them.

A. If they are sold direct by Bridgeport, we would not have anything to do with them.

Q. Now, Peoples?

A. Peoples buy some items, I believe, direct, and others they purchase from local wholesalers. Now, if Peoples had a store in—I am using Peoples only as an example—if Peoples had a local store, say in Columbus, Ohio, would your salesmen from your wholesale drug division call on that local store?

A. I am trying to think of an actual case. I don't know. I don't think Peoples has a store in Columbus.

Q. I don't think they have either.

A. We sell Peoples, I know, in this area right here [indicating].

Mr. McGRATH. Indicating what area?

The WITNESS. Akron. I am sure we sell Peoples in the
285 Akron area. I do not think we have any wholesale business with Peoples in these areas [indicating].

Q. Or any other chain in those areas other than Sears, Roebuck?

A. Sears, Roebuck, and maybe Walgreen. I mean, I don't know whether we sell the Walgreen store or not. Their biggest store is in the Pentagon Building, I understand, and we may be selling that.

Q. Do you engage in any radio or newspaper advertising that goes to retailers in cities like Columbus and Indianapolis and Evansville?

Mr. SULLIVAN. When you say "you"—

Q. I am referring to the wholesale drug division.

A. Our wholesale drug division does very little newspaper advertising. About the only time we do any newspaper advertising is in connection with a so-called promotion. We have had a Christmas promotion, at which we have run advertisements, I believe, in the Columbus papers, but that is because Kauffman-Lattimer or some other druggist asked to cooperate with our promotion. We said, "Sure," and we have done that in some of these cities, when another wholesaler said he wanted to go along and paid his proportion of costs.

Q. Now, I will ask you whether McKesson wholesale drug
286 divisions sell any drug products to retailers in those cities indicated by the red dots.

Assuming there is no solicitation whatsoever, do you make any sales to retailers of drug products in the cities indicated?

A. It would be a very unusual case, I am sure, except for these chains that may have branches there, stores that may have branches there, that we may sell some place else. For instance, we sell Walgreen out of Chicago. They may have some branches here. We happen to sell J. C. Penney. If they have a store in Indianapolis, I don't know whether we sell that store or not.

Q. Do black lines around the borders of the yellow areas on this map represent the outer limits of the territory within which the wholesale drug divisions solicit orders for drug products from retailers?

Mr. McGRATH. How can he answer that question? He has not drawn it.

Mr. SULLIVAN. Now, Mr. Dobe, in submitting that map to you and outlining the trading areas of our wholesale divisions, we stated that to the best of our knowledge that was the outer limits of the trading areas, but we pointed out that those trading areas were not defined definitively in any document or set up
287 definitively in any other way; that it is a historical growth, and to the best of our knowledge that is the outer limits of the trading areas of our wholesale divisions.

Mr. DOBEY. When you say "outer limits of the trading areas," do you mean the outer limits of the territory within which your salesmen solicit orders from retailers?

Mr. SULLIVAN. That is correct. The areas in which they concentrate their efforts in making sales.

Q. My question is: Is that the outer limits of the territory within which they do solicit orders from retailers?

Mr. SULLIVAN. To the best of our knowledge, it is.

The WITNESS. May I add something here? You must understand that these boundaries are flexible, that we are constantly moving around, making a little more territory, or we may pull back. You are not static, at any particular period.

Mr. SULLIVAN. There is nothing static in that a salesman is told he is allowed to go up to this line and then stop, that he can't go across the street.

Q. If you know, do the independent wholesalers who are located in the cities shown by the red dots solicit orders from
288 retailers within the yellow portions of the territories shown on the map?

A. I am sure they do. For instance, I know that Kauffman-Lattimer come down in here, and come in there [indicating].

Mr. McGRATH. When you say "in here," the record does not show where you are talking about.

The WITNESS. All right. They go into the northern part of Ohio and they go into the southern part of Ohio on the yellow.

Q. That was the next question I had, about Kauffman-Lattimer, and you have already answered it. Kauffman-Lattimer does solicit orders from some of the retailers in some of the yellow territory?

A. I think so.

Mr. SULLIVAN. We think they do, but of course, we have no knowledge of the trading areas of these other wholesalers.

Q. Does the Kiefer-Stewart Drug Company of Indianapolis solicit orders from retailers in any of the yellow territories shown on either side, above or below the yellow dot?

A. I know very little about Kiefer-Stewart; where they operate, except in Indianapolis, I don't know.

Q. You do not know whether they go into the yellow territory?

289 A. No.

Q. In the case of Kauffman-Lattimer, you do know that they go into the yellow territory?

A. Yes.

Mr. SULLIVAN. He thinks they do.

Mr. DOBEY. He says he knows that they do.

Q. What about Charles Leich & Company?

A. I know very little about Charles Leich.

Q. Do you know whether they go into the yellow territory?

A. No, I don't.

Q. H. P. Gilpin has three locations, I believe, one at Norfolk, one at Washington, and one at Baltimore. Does McKesson have a wholesale drug division—I see the map shows that McKesson has a wholesale drug division at Roanoke.

Does McKesson compete with H. P. Gilpin Company out of Roanoke in a portion of this Virginia territory?

A. I would doubt it; I don't know. I don't know what area they cover.

Q. How about Richmond?

A. I don't know about that.

Q. Do you know whether your wholesale drug division or one of your wholesale drug divisions competes with the
290 Pennsylvania Drug Company whose office is at Wilkes-Barre? Does it compete in New York State, in portions of New York State?

A. That is the first time I ever heard the name of the Pennsylvania Drug Company.

Q. I believe you said earlier you do not have any salesmen who call on the trade in Philadelphia?

A. Not to my knowledge. I don't know. I don't think so.

Q. I understand that Smith, Kline & French of Philadelphia has a subsidiary, Mercer Wholesale Drug Company, at Trenton, New Jersey. Do you have salesmen who call on retailers at Trenton, New Jersey?

A. I think so.

Q. From what wholesale division?

A. I think from Newark.

Q. From your Newark division?

A. Yes.

Q. Do the red dots on the map indicate the location of the wholesale drug divisions of McKesson that are nearest to the green dots?

Mr. SULLIVAN. The red dots?

Mr. DOBEY. I am sorry. Do the green dots indicate—

291 Mr. SULLIVAN. The green dots indicate the nearest wholesale division to the independent wholesalers represented by the red dots.

Mr. DOBEY. Thank you.

Q. Do you have any agreement with any of the independent wholesalers not to compete with the wholesaler in any particular area?

A. No, sir; we do not have any agreements not to compete with anyone.

Q. What was your approximate total dollar volume of sales of drug products by the wholesale drug divisions for your past fiscal year?

A. Off the record just a second.

(Discussion off the record.)

The WITNESS. The last fiscal year would have to be March 31, 1954. That was \$338,000,000. Now, that is a little flexible, and

I don't know whether that is net or gross sales. You asked drug products. It may include fixtures and things of that type, but what we generally consider our drug volume, was \$338,000,000 in that fiscal year, I believe.

Q. That is exclusive of liquor sales?

A. That is exclusive of liquor.

Q. When Mr. Dewell testified, I believe he said the manufacturing division's sales for its last fiscal year were approximately ten or eleven million dollars. Now, you have told me that your sales for the past fiscal year were \$338,000,000.

A. \$338,000,000, I believe.

Q. Has that ratio of sales of the manufacturing division compared to sales of the wholesale drug divisions varied substantially during the past few years, or has it been about the same?

A. Frankly, I don't know, but I don't think it has varied substantially. I don't know.

Q. Is McKesson the largest drug wholesaler in the United States?

A. I believe so.

Q. Do you know of any other drug wholesalers of comparable size to McKesson?

A. No, not strictly drug wholesalers, no.

Q. Do you know of any other drug wholesalers who do business on a national basis?

A. Off the record a minute.

(Discussion off the record.)

The WITNESS. I don't know of anybody else that operates nationally.

One correction: Rexall-United Wholesale Drug, I believe, operate nationally.

293 Q. What is the relationship between those Rexall Drug Stores and the wholesale concern?

A. We have been trying to find that out for years. If we are going to get out of here in the next month, I don't think we want to get into that one.

Q. Do they own the retail stores?

A. Frankly, I wish you people would look into it, but I don't know.

Q. One of my questions was whether there is any drug wholesaler or any drug manufacturer who did also own retail stores, any one of size.

A. A manufacturer?

Q. Who also operates retail stores.

A. Well, Rexall does, Rexall-Liggett own retail drug stores. Walgreen own retail drug stores. Sun Ray own retail drug stores.

Q. I am referring to wholesalers.

A. They are wholesalers. They are wholesale as well as retail.

Q. Do they sell to other retailers?

A. Sure.

Q. Which ones sell to other retailers?

A. Rexall, Walgreen, Sun Ray, Whelan.

Q. Can you tell me what approximate percentage
294 of the total wholesale drug business in the United States is done by McKesson?

A. That would be—I think you would have to define first of all the wholesale drug business; and I think you people are in a better position to give that than we are. We can give you our sales, but I really wouldn't know.

Q. Have you seen any national figures on wholesale drug sales?

A. Yes; I have seen some figures on wholesale drug sales.

Q. Are they Bureau of the Census figures?

A. I assume Bureau of Census figures, but I don't recall them offhand, but it would be a very difficult thing for me to answer. I think the Bureau of the Census could give you a much better answer than I could.

Q. Do you have a trade association that gives out that type of total?

A. We have a trade association in the wholesale drug field that gives out the sales on their members, but it does not include all wholesalers.

Q. When Mr. Dewel testified, he stated, as I understand it, that the manufacturing division employed eight or nine salesmen whose function it was to call on chain stores who purchased direct from the manufacturing division and solicited orders from these stores, and that the manufacturing division endeavored to avoid duplication of solicitation by the wholesale drug divisions with respect to these direct-buying retail customers. Is that correct to your knowledge?
295

A. I think he has answered the question far too simply. We do solicit business of a type, from practically every drug store in the areas where we operate.

Q. Including the stores that buy direct from your manufacturing division?

A. If they will give us some orders, sure.

Mr. SULLIVAN: What kind of business are you talking about? Are you talking about McKesson products, or are you talking about all other products?

Mr. DONEY. I am going to cover both aspects of the matter.

Q. Do the wholesale drug divisions advise their salesmen of the list of retail accounts buying direct from the manufacturing division?

A. I wouldn't know, but I think those salesmen would know.

Q. They would know the account?

296 A. I think they would, I don't know. Most any salesman would know what lines are sold direct, what customers buy or order certain lines directly.

Q. Are the wholesale drug divisions' salesmen instructed not to call on chain stores buying direct from your manufacturing division?

A. No; not that I know of.

Q. Is it true that some of the direct-buying retail accounts of the manufacturing division do not purchase the complete line of McKesson products from the manufacturing division?

A. Would you state that again, please?

Q. Is it true that some of the direct-buying retail accounts of the manufacturing division do not purchase the complete line of McKesson products from the manufacturing division?

A. I would imagine that is true.

Q. Do the wholesale drug divisions sell some McKesson products to the direct buying retail accounts of the manufacturing division?

A. Sure. Whatever they order from us, we will sell them.

Q. Would those include McKesson products that the retailer does not buy direct?

A. It might include either one.

297 Q. In the case of the ones that he does buy direct, your answer would be true, because of the fact that he may be out of a particular item?

A. If a retailer is out, he will buy that item from us, I am sure.

Mr. McGRATH. Is it not a fact that all these questions depend upon the mood or the caprice of the particular retailer? There is no restriction. He can buy where he likes. Wherever he orders, the order will be filled; is not that right?

The WITNESS. That is right.

Mr. McGRATH. You are asking him to substitute for the retailer in answering these questions. All he can say is that there is no restriction.

Mr. DOBEY. I want to know what his wholesale drug divisions actually do.

Q. Do you testify that you do sell some McKesson products to retail accounts of the manufacturing division?

A. I don't know of first hand information, but I am sure we must, because we would sell them anything.

Mr. McGRATH. There is nothing to stop them?

The WITNESS. Nothing to stop them.

Mr. McGRATH. Either policywise or any other way?

The WITNESS. No.

298. Q. Do salesmen of the wholesale drug divisions call on retail accounts of the manufacturing division?

A. They may, or they may not.

Q. Depending upon whether the retail account of the manufacturing division has a store in the territory of the wholesale drug division?

A. Well, that is one factor, and the second is the desires of the retailer. Some retailers would not let us call on them, but they still give us business. They don't want a salesman in the store.

Q. In other words, in some cases, you may get orders from these direct buying retail accounts, although you do not call on them?

A. That is right. In some cases we would call on them.

Q. In some cases you do call on them?

A. Yes.

Mr. DOBEY. Would you mark these two documents as G12 and G13; G13 is an enclosure to G12, but I am going to have it marked separately.

(Photostat. of letter on letterhead of Peoples Drug Stores, dated March 10, 1955, marked "Exhibit G12" for identification, as of this date.)

(Enclosure with Exhibit G12, being photostatic list of 299. Peoples Drug Stores, marked "Exhibit G13" for identification, as of this date.)

Mr. DOBEY. Exhibit G12 is a letter from Peoples Drug Stores, in which they forwarded a list, which is Exhibit G13, of their retail stores showing the location of the stores and they say, "I am sure all of our stores carry in stock some McKesson & Robbins, Inc., merchandise since we warehouse a few of their items, and in addition our stores would naturally stock other items for which they receive calls by ordering from their local jobbers."

Q. Is that the type of practice to which you were referring with respect to sales to local stores of an account buying direct from the manufacturing division?

A. I would think so. I mean I don't know.

Mr. McGRATH. Of course he has not been referring to anything. He has been answering your questions.

The WITNESS. I think so. Most any drug store would buy any products for which a customer comes in, and if they have a call for instance, for an item, they would stock it and get it wherever they could.

Q. You would say that the practice reflected in that letter is not unusual?

A. I think that is right.

Q. It is customary; is that correct?

300 A. As far as I know, it is; yes.

Q. Do the wholesale drug divisions endeavor to sell other products than McKesson products to the direct-buying retail accounts of the manufacturing division?

A. Oh, I am sure they do.

Q. Do they actually make such sales?

A. Sure.

Q. Are such sales sometimes made to the individual local stores or the chain of drug stores?

A. Yes.

Q. Is it true that the local stores of a chain of drug stores, as a matter of custom in the industry, have some local purchasing authority to buy drug items from drug wholesalers?

A. Oh, I am sure they must have.

Q. In other words, all the purchasing of drug products by the chains is not done at the home office?

A. No, of course not.

Q. You testified that your wholesale drug divisions solicited some chain drug store concerns, but that you did not call on them if they said, "We do not want any calls by your salesmen"?

A. Sure.

Q. Is it customary in the industry? In other words,
301 would the same thing be true of other drug wholesalers?

A. Oh, I am sure that there are certain customers that don't want you to call on them, and others that do want you to call on them.

Q. Would other drug wholesalers call on local stores of chains, as you do?

A. Of course, I would imagine so.

Q. Does the Sun Ray Drug Company have retail stores in Pittsburgh?

A. I don't know. You are talking about Sun Ray of Philadelphia?

Q. Yes.

A. I don't know. I think there is a Sun Ray, but I don't think it is the same Sun Ray; but I don't know.

Q. Do your wholesale drug divisions compete with the manufacturing division in selling McKesson products to retailers?

A. Oh, I would think so.

You mean to retailers—you are talking about these chains?

Q. Chains; yes.

A. Just like we are with any direct selling manufacturer.

Q. So in selling to the chains, you are really in competition with your manufacturing division, is that right?

302° A. That is right in one sense but not at the same functional level.

Q. I asked Mr. Dewell the question: How many vice presidents there were in the wholesale drug divisions, and I believe there was a problem about categories and regional vice presidents.

Can you answer my question?

A. I don't know exactly, but there are quite a few in the drug division.

Q. Approximately how many?

A. Well, I would say somewhere between seventy and a hundred in the drug end of the business.

Q. All with the title of vice president or regional vice president?

A. Well, I don't think we have the title regional vice president any more. We do have a title of district vice president, but I would think there were somewhere in that neighborhood. I don't know.

Q. As I recall, Mr. Dewell stated that McKesson was originally a drug manufacturer?

A. He knows much more about the history of McKesson than I do, but from what little I know, I think that is probably right. They started out as a manufacturer, but that is back in 1833, and I don't even know if we had drug stores at that time.

303 I really do not know, and I don't think many people in McKesson know quite that far back.

Q. Is it true that the firm went into the wholesale drug business about 1929 or 1930?

A. I don't know that. I am sure that we were in the wholesale business before that. I think in 1928 or 1929, we merged or consolidated with a number of others, a number of other wholesalers, but I think when we got into the wholesale business was before that.

Q. Approximately how many employees do the wholesale divisions have, all types of employees, if you know?

A. I think McKesson altogether, in everything, has between nine and ten thousand employees, and I don't know just how you classify some of these employees, because we handle liquor in some of our wholesalers, but I would think in the wholesale drug end of the business there are probably in the neighborhood of 7,000. I could be a little off on that.

Q. Paragraph 4 of our complaint reads as follows: "The defendant is one of the largest wholesalers of drug store merchandise in the United States. Operating through more than 70 divisions located in 35 states, it conducts a nationwide business, dealing at wholesale in drugs, pharmaceuticals, surgical and
304 medical supplies, toilet articles, and sundry other items customarily sold in drug stores."

I am directing your attention to that portion of the paragraph which says, "It conducts a nationwide business." Then in paragraph 4 of the answer admitting those facts, and in paragraph 5 of the answer, the defendant states: "That it admits that in the conduct of its wholesale drug business the defendant sells drug store merchandise, including 'McKesson products,' principally to drug stores and other retailers located throughout the United States."

The question I am asking is: Do the wholesale drug divisions sell McKesson products and other drug products to drug stores and other retailers located throughout the United States?

A. Well, if you mean in every city, I would doubt that, but substantially throughout the United States, yes.

Of course, that is principally concentrated in the areas where we are located.

Q. I was thinking of the map. Now, you remember there were areas in there—

A. That is right, but as I told you then, we do very little solicitation of business in those areas. We solicit in the areas largely outlined in yellow on that map. I am sure if you got that map from us—

305 Q. Is it true then that there are areas of the United States which are not serviced by a wholesale drug division of McKesson?

A. If you mean in the normal sense of the term, that is right. There are areas which we do not normally service.

Q. Do the wholesale drug divisions sell to retailers located in every state of the United States? Do you cover every state?

A. I don't think so. I am sure we do not cover Delaware, for example, and there must be some other states that we do not cover.

Q. Do the McKesson wholesale drug divisions solicit orders for McKesson products from wholesalers who buy direct from the manufacturing division?

A. To solicit orders—I don't think we would solicit orders actively.

Q. From a wholesaler buying directly from the manufacturing division?

A. I don't think we would do that. If you mean by that, actual solicitation, going out and saying "Won't you buy through us?", I don't think we would do that.

Q. Do the wholesale drug divisions solicit orders from these wholesalers who buy direct from McKesson?

A. You mean from McKesson, Bridgeport?

306 Q. From the manufacturing division for drug products other than McKesson products.

A. No, that would be handled all about the same way. We are not engaged in subjobbing, as such.

Q. The business of selling to other wholesalers is not solicited by your wholesale divisions?

A. That is right. It is handled largely as a convenience.

Q. Is it not true that some of the wholesalers who buy direct from the manufacturing division do not purchase the complete line of McKesson products?

A. I think that is true. A great many of our divisions do not purchase the complete line.

Q. Do you try to sell those wholesalers the items of McKesson's which they do not purchase direct?

A. I don't know. I think we would sell most any item they wanted.

Q. Do you actively try to sell them?

A. No, I am sure we do not.

Q. With respect to the wholesalers to whom you do sell, and particularly the wholesalers that do not buy direct from your manufacturing division, do you solicit orders from those wholesalers?

A. If you mean by "solicit"—I doubt it.

307 Q. I mean try to get the business.

A. I doubt very much if we would actively solicit.

Mr. McGRATH. They are competitors at the same level, is that right?

The WITNESS. Yes, but the only thing we would do is on a convenience basis.

Mr. McGRATH. Just accommodation?

The WITNESS. That is right.

Q. I am coming to that, and I would like to ask it direct.

What is the occasion for the sale of McKesson products by the wholesale drug division to other wholesalers?

A. A wholesaler gets an order for merchandise, and on that order—maybe some orders for some Tartan, for example, which is a Bridgeport product. If he does not have it in stock, he will probably call us up and ask us if we can send it over to him, not to the customer, but to the wholesale house.

Q. You do that as a courtesy to him?

A. Yes. We may call him up on some items the same way.

308 Q. Are not these wholesalers to whom your wholesale drug divisions sell, competitors of the wholesale drug divisions?

A. Oh, I am sure—if they are wholesale druggists in that neighborhood, then undoubtedly they compete with us.

Q. Would you explain why they do not buy these products, particularly McKesson products, direct from the manufacturing division?

It is hereby stipulated that the testimony when transcribed may be subscribed and sworn to by the witness before any notary public of the State of New York.

[Reporter's certificate to foregoing transcript omitted in printing.]

340 United States District Court, Southern District
of New York

Stenographer's minutes of May 18, 1955

Before Hon. JOHN W. CLANCY, *District Judge*

NEW YORK, MAY 18, 1955; 11:30 o'clock a. m.

APPEARANCES

[Title omitted.]

J. Edward Lumbard, Esq., United States Attorney, for the Plaintiff; by Allen A. Dobey, Esq., E. Winslow Turner, Esq., and John F. Hughes, Esq., Special Assistants to the Attorney General.

Hodges, Reaves, McGrath, Pantaleoni & Downey, Esqs., Attorneys for Defendant; John P. McGrath, Esq., Denis B. Sullivan, Esq., Robert Thrun, Esq., and Laurence C. Ehrhardt, Esq., of Counsel.

341 The CLERK. United States of America vs. McKesson & Robbins, Inc. Gentlemen, are you ready?

Mr. DOBEY. Yes.

Mr. McGRATH. Yes.

The COURT. I don't think any openings are needed in this case. Do you wish to open?

Mr. DOBEY. No, sir.

Mr. McGRATH. No, sir.

OFFERS IN EVIDENCE

Mr. DOBEY. I offer in evidence the plaintiff's first set of interrogatories, including Government Exhibits A and B, which are attached thereto and part of the interrogatories, and I also offer in evidence the defendant's answers to the plaintiff's first set of interrogatories.

Mr. McGRATH. We have no objection.

Mr. DOBEY. The originals are with the Court.

(Government's Exhibit G1A received in evidence.)

(Government's Exhibit G1B received in evidence.)

Mr. DOBEY. I offer in evidence the plaintiff's supplemental interrogatories, including Exhibits G1 to G7 attached there-

A. I think you have to ask our manufacturing division about that. I mean I don't know.

Q. I thought maybe you would know.

A. No.

Q. Is not this true: That generally speaking the wholesalers to whom your wholesale drug divisions sell are carrying products, a line of products competitive with McKesson products, and they buy McKesson products from your wholesale drug divisions only as an accommodation to the customers when they have a specific order for a McKesson product?

A. I would think that is probably true. They may want to sell—I think most of them would be an accommodation.

Q. Generally speaking, they are not pushing the McKesson line?

A. That is right.

Q. In Exhibit 5 which was written by you, you ask
309 your wholesale drug divisions to send Mr. Dewell in Bridgeport a list of wholesalers, showing name and address, to whom you sell McKesson products.

Now, it has been a matter of argument, before, between counsel and with Mr. Dewell about the construction of that document. I got the implication from it that those other wholesalers to whom your wholesale divisions sold McKesson products were more or less regular customers of your wholesale drug divisions; that is, that they made repeated purchases from time to time of McKesson products from the wholesale drug divisions; is that correct?

A. Well, if you mean by "repeated purchases," a number of purchases, that is probably true; but if you mean any sizable volume of purchases, that probably is not true, because I am sure that our sales to other wholesalers of McKesson products is peanuts.

Q. You think it is true that those wholesalers who would be on that list, would be wholesalers who made repeated purchases in small quantities?

A. I don't know, but that is probably true.

Mr. SULLIVAN. Do you mean by that that they came back on occasion sometime, and made other purchases?

Mr. DOBEY. Yes.

310 Mr. SULLIVAN. Sure, that is true.

Q. In other words, your list would not include a wholesaler who just purchased an item one time and then you never heard from him again for a long period of time?

A. That is right.

Mr. SULLIVAN. It could be he just did it once.

The WITNESS. If he had done it just recently, if we had just made a sale to a wholesaler last week, the first time he ever purchased, he would probably be on that list.

Q. Is it not true that most, if not all these other wholesalers who purchase McKesson products from the wholesale drug divi-

sions carry a small inventory of McKesson products, not the complete line, but at least a few items in stock?

A. Well, I would think that most of them would probably carry a few items, very fast selling items like Tartan.

Q. And possibly Albolene?

A. Well, I don't know about Albolene, but Tartan is one. I don't know that; I really do not know. They probably have Calox.

Q. My information is that they do; most of them do carry
311 a small inventory of selected fast-moving items of McKesson products.

A. They probably do.

Q. Of course, they would call you to get an item of which they were out, if a customer asked for it?

A. That is right.

Q. But also they stock some of your items, fast moving items?

A. I would imagine they would.

Q. You believe that to be correct?

A. I think so.

Q. Could we add Bexel? Isn't that a fast-moving volume preparation?

A. It is, but I don't know. I don't know whether you would find that on inventories of other wholesalers or not.

Q. We mentioned Tartan several times. Is it not true that some wholesalers buy Tartan direct from the manufacturing division at the higher discount?

A. They may. I don't know.

Q. I wondered if you know that it is true that many wholesalers can buy Tartan direct from the manufacturing division at the larger discount, who can't buy the other McKesson products from the manufacturing division?

312 A. I didn't know that. I don't know what their order schedule is on Tartan.

Q. I believe you have already helped me on this question, and if you can, it saves the need for a substantial amount of testimony.

First, as background, most of these wholesalers who purchase from the wholesale drug divisions of McKesson are located in the same city as the McKesson wholesale drug divisions?

A. In the same area, I would think, in the same area; they may be in a different city.

Q. I checked your list, annex to Item 14, and Annex to Item 19, and I found that both lists, most of them, the majority of them are in the same city.

A. That is right.

Q. And the other appear to be in outlying areas.

A. That is right, in the same area.

Q. Your wholesale drug divisions compete with those wholesalers?

A. If they operate in the same area, sure.

Q. Is there any substantial difference in the characters—not referring to moral character—of direct-buying wholesalers who buy direct from the manufacturing division and the wholesalers who purchase McKesson products from the wholesale drug divisions, insofar as the nature of their business operation is concerned?

A. I don't think they sell—of course, the difference between wholesalers—I think they would be basically the same.

Q. Have any of the wholesalers who purchase from the wholesale drug divisions inquired of you as to whether they could buy direct from the manufacturing division?

A. They wouldn't ask us that. I mean, they have never asked me, but whether they have ever asked our divisions, I doubt if they would ask a question of that type to any one of our divisions.

Q. If you got such an inquiry, you would refer it to the manufacturing division?

A. We would probably do nothing.

Q. Because you would like to keep the business in the wholesale drug divisions?

A. Well, they are a manufacturer. We are not getting into that.

Q. I didn't understand you.

A. They are a manufacturer. We are not—any wholesaler, he knows how to approach our manufacturing division.

Q. Do your wholesale drug divisions sell any McKesson merchandise to retail grocery stores?

A. I frankly don't know, but I would doubt if they sell any considerable amount because as a general policy, we do not service grocery stores.

Q. What about Tartan? Do you service grocery stores on Tartan?

A. I would doubt it. Accounts like that would not be profitable for use.

Q. I think I may have raised this point before: Apparently, according to my information, there are many wholesalers who buy Tartan direct from the manufacturing division at twenty-five percent discount, but they do not buy any other McKesson items.

A. That may be. They probably have a demand for Tartan and very little demand for anything else.

Q. Do you know of anything that prevents a wholesaler who can buy Tartan at the twenty-five percent discount, apart from the

volume requirement, from buying other McKesson products direct from the manufacturing division?

A. That is completely out of my province.

Q. Is there any particular class or classes of retailers handling drug store merchandise that are not solicited by salesmen of the wholesale drug divisions?

A. You mean by that syndicate stores, the Woolworth stores and so forth?

315 Q. Any class; yes.

A. There probably are. I am sure there are.

Q. What classes would they be?

A. I mean normally, we do not call on syndicate stores, although we may sell some occasionally. We confine our activities quite generally to the drug trade.

Q. To drug stores?

A. The vast majority of our business is there, that is right, but if a department store has a drug department, we may solicit business from them.

Q. Do you have any announced policy or company policy of the wholesale drug divisions with respect to the extent of the retailers that you will solicit in the area of the wholesale drug divisions?

A. Well, if you mean are there any limitations—is that what you mean?

Q. Do you call on all retailers within the territory?

A. We try to call on most any drug store in an area that we think we can develop into a profitable account for us; but we probably would not call on other types of trade.

Q. You would call on all drug stores within the area normally?

316 A. I think so. Any drug store that we thought we could develop into a profitable customer, we would call on them.

Q. Do you know of any firm other than McKesson that not only manufactures its own line of drug products, but also operates its own wholesale drug divisions?

A. Well, Rexall. I don't know to what extent Whelan and Walgreen manufacture, but they have their own products.

Q. Rexall manufactures, did you say?

A. I am sure they do. They own some plants, I know. Then, of course, most of the pharmaceutical manufacturers or a great many of them, Parke Davis, Sharp & Dohme, Upjohn.

Q. Do they operate wholesale drug divisions?

A. They operate warehouses and so forth, wholesale their products to the retailer.

Q. Do they wholesale other products than their own manufactured products?

A. I think mostly their own manufactured products, those manufacturers.

Q. I think maybe the record is a little confused as to the vast group, Parke Davis—

A. They are our competitors.

Q. Is it true that they only operate warehouses for their own manufactured products?

317 A. Basically, but these manufacturers also make arrangements to distribute other products to some extent.

Q. Do you know of any firm that manufactures drug products, operates its own wholesale drug divisions, and also sells its own manufactured drug products to other wholesalers?

A. Leaving the Rexall out of it—you mean just in the drug field?

Q. Yes.

A. Except for pharmaceutical manufacturers, I am sure there are some. Except the pharmaceutical manufacturers and people like that, I don't know. General Electric—

Mr. McGRATH. Of course, any transaction you conduct with another wholesaler, any one of these people might also conduct with another wholesaler; isn't that right?

The WITNESS. That is right.

Q. Does each wholesale drug division maintain a separate banking account?

A. I think so.

Q. Is this maintained in the city in which the wholesale drug division has its office?

A. That would be the normal procedure, I am sure.

318 Q. It there a bank account at any location, including the home office, for the wholesale drug divisions collectively?

A. Really, I don't know.

Q. We have come up before with the question of the manufacturing division making "sales" to the wholesale drug divisions of McKesson products, and the wholesale drug divisions making "payment" for the products acquired from the manufacturing division, and there is a controversy between counsel as to whether that is a "sale" in view of the fact that it is an intercompany transaction.

I wonder if you can tell me how a check from a wholesale drug division covering products shipped to it from the manufacturing division would read; payable to whom or what?

A. I don't know.

Q. Or signed in what way?

A. I don't know.

Q. Is the purchasing of products other than McKesson products for sale by the wholesale drug divisions done by the home office in New York?

A. No.

Q. Does each wholesale drug division do its own separate purchasing?

319 A. Yes. I mean, for all practical purposes, and on practically every transaction. The only thing we might buy in New York would be samples or something like that, but the day-to-day buying is all done in the divisions.

Q. By each division?

A. Each division separately.

Q. Each division does its own purchasing directly from the manufacturer?

A. That is right.

Q. Does each division make payment direct to the manufacturer?

A. Yes. Once in a while, you understand, there are always unusual circumstances where a manufacturer is in difficulty or he owes us some money, and we might collect the checks. But the day-to-day checks are sent out from the divisions.

Q. How many wholesale drug divisions do you have at present?

A. Seventy-four.

Q. Going back a moment to the Annex to Item 9, I think the answer to my question is rather obvious, but I think I should ask the question. Referring to this list [handing document to the witness], to get the discounts shown on that list on assorted
320 orders, all the products which are calculated in determining whether the order is entitled to a particular discount, must be McKesson products, must they not?

A. That is right.

Q. In other words a mixed order?

A. No, McKesson; Eli Lilly wouldn't do it—

Q. That would not help you at all in this case?

A. No.

Q. Have any of the wholesale drug divisions received from any retailer a single order for McKesson products of \$1,000 or over during the past two years?

A. You are asking me something I don't know. I would doubt it. That is a hell of a big order.

Q. Your statement is that you do not know?

A. I don't know about that—you mean \$1,000 of what?

Q. Of McKesson products in one single order.

A. I would doubt it. I don't know.

Q. You say you would doubt it. What about the case of a new drug store stocking for the first time?

A. It would be some drug store that would ever buy \$1,000 worth of McKesson items. Now even the Walgreen store in Washington, I don't think would have \$1,000 worth.

Q. You have some items in there that are pretty
321. expensive, haven't you?

A. Yes.

Q. Vitamins?

A. Yes, but you do not buy very many vitamins in one store at one time. That is really a big order.

Q. Wouldn't a new store, stocking for the first time, need \$1,000 worth of McKesson products?

A. Do you know how much of a stock a drug store carries?

Q. Total stock?

A. Yes.

Q. What drug store?

A. The typical drug store carries about five or six thousand of inventories of drug products. Average sales of a drug store are between \$50,000 and \$60,000—not the average sales. The average sales are about \$80,000. The margin is one-third, so the cost of the merchandise is a little over \$50,000. That is on the average store. I mean, you buy four times a year, so even the average store would carry \$12,000 worth of merchandise, including the soda fountain in the back room, and everything else.

Q. Don't you sell some chain stores McKesson products, chain stores that do not buy direct from the manufacturing division?

322. A. Oh, yes; sure.

Q. Wouldn't you get some orders from them for McKesson products, single orders in the amount of \$1,000 or over?

A. It is possible.

Q. But you do not know?

A. I don't know. Most people buy for their individual stores from the wholesaler, and we don't get many orders—our average order is only \$45 for everything.

Q. What about a retailer who has half a dozen stores in one city?

A. Still, our average order is small, because he buys every day.

Q. But he might buy McKesson products on a single order in the amount of \$1,000, might he not?

A. Of course, anything can happen, but I am sure—if you are asking if he is likely to do it, I would say no.

Q. Let me ask you this: Do you keep invoices of your sales by the wholesale drug division to retailers?

A. I am sure they have a record of customers' purchases, sure.

Q. How far back would you keep them?

323. A. I don't know. I don't know how long we keep invoices. Certainly not over two years, unless there is some controversy of some kind.

Q. What I would like to get is specific information on how many single orders for McKesson products amounting to \$1,000 or over have been sold by the wholesale drug division during the past two years.

A. I imagine all we could do on a thing of that kind would be to ask our divisions.

Mr. EHRHARDT. Off the record.

(Discussion off the record.)

Mr. DOBEY. We are going to need that information for the trial.

(Discussion off the record.)

Q. Do the McKesson wholesale drug divisions maintain a sufficient stock of McKesson products to enable them to fill a single order from a retailer for McKesson products for \$1,000 or more?

A. If the order specifies the products they have in stock.

Q. What would be the normal inventory of McKesson products carried by a McKesson wholesale drug division?

A. Pardon me, let me do a little thinking, off the record.

(Discussion off the record.)

324 The WITNESS. Our inventory of McKesson products would be about \$15,000, I would think, in a normal division.

Q. For each wholesale drug division?

A. Not for each one; for the typical one.

Q. \$15,000 of McKesson products?

A. I would think so.

Mr. McGRATH. Distributed into how many items?

The WITNESS. Not all wholesale divisions carry all items. It is possible to have over 200 items, but I don't know how many items they would carry. It is considerably less than that.

Mr. SULLIVAN. Available for sale to how many customers?

The WITNESS. An average of 400 customers, I would think. You understand that my rapid figuring was done on the basis of sales, not on inventory figures, so I may be off.

Mr. SULLIVAN. So that is \$15,000 of inventory?

The WITNESS. I was figuring three percent of our sales, six turns a year which is the normal. I think our turn is 5.7 or 5.8.

Q. But as to whether there have been any such sales, you do not know?

325 A. I don't know.

Q. Can you answer this question: If there were any such sales, would they have been made at a ten and five discount, or a ten and five and five discount?

A. I don't know. I would think that they would be made at the terms which are shown in our cost book sheet, which you had a moment ago, this one here [indicating].

I would assume they would be made at this schedule.

ME. McGRATH. Referring to Exhibit 8?

MR. DOBEY. Yes.

THE WITNESS. Ten and five plus cash discount.

Q. Do the wholesale drug divisions ever sell McKesson products below the prices shown in Exhibit 8 in fair trade states?

A. I don't think—unless there were a mistake of some kind. We do make errors, but other than that, I don't think they would deliberately sell them below the fair trade price.

Q. Of course, what I am asking you is: Do the wholesale drug divisions sometimes sell below McKesson's on fair trade list?

A. Not that I know of.

Q. Do the wholesale drug divisions sometimes sell McKesson products to retailers at the fair trade price shown on Exhibit 8 and at the same time give the retailer additional items free, additional McKesson products free?

A. We do have free goods deals which are available to any wholesaler handling the Bridgeport line. Now, I don't know how they are covered in the fair trade contract.

Q. What I am asking you is whether the McKesson wholesale drug divisions sell to retailers at the fair trade prices and then give the retailer a deal whereby he gets a certain amount of McKesson products free along with those items, and at the same time not permit the independent wholesalers to do the same thing?

A. We can't prohibit the independent wholesalers from doing anything.

Q. You have got a fair trade price schedule?

A. You are talking about our manufacturing division?

Q. No.

A. We don't have anything to do with other wholesalers.

Q. All right, I see your point. What I am asking you is: Do you sell to retailers at the fair trade prices and then give them additional McKesson products free?

A. We don't, unless it is part of the regular terms. I mean, we don't give anything from our division that any distributors of McKesson products—I say any distributors—I mean any one of these other wholesalers that handle the full line.

Q. What about the wholesalers that buy from you and do not handle the full line?

A. I think they can probably buy the deal if there is a free goods deal. I don't know. I mean, I would assume if there is one free, they probably would buy it. They would get it just like anyone else would.

Q. I will ask you specifically whether your Boston wholesale drug division does not sell to retailers at those fair trade prices and at the same time give them free goods; whereas wholesalers,

other wholesalers who handle McKesson products, possibly not the complete line, are bound by those fair trade prices?

A. I don't know just exactly how that free goods is handled.

Q. Do you consider that the giving of free goods to the retailer along with other McKesson items that are sold at the fair trade price is a violation of this fair trade agreement, or would be a violation, if you were a party to it?

A. You are asking me what is a violation of the fair trade contract. Frankly, I don't know. That is a legal matter, I think.

Mr. McGRATH. He has already said that they would be part of the terms which would be available uniformly across the board to all distributors.

The WITNESS. Can we go off the record a second?

(Discussion off the record.)

Mr. DOBEY. Back on the record.

Q. Let me ask you this: Do your wholesale drug divisions sell McKesson products at the fair trade price to retailers, and as part of a deal, give the retailer free goods, when that type of transaction has not been authorized by the manufacturing division with respect to all wholesalers?

A. I would doubt it very seriously. I mean we would—we pretty generally—I say pretty generally—our instructions are to follow the manufacturer's suggested selling schedule, and Bridgeport is the manufacturer with us, just like anyone else.

Q. Do you know whether either your Boston office, of your Ogden, Utah office has been giving free goods to retailers?

A. I don't know.

Q. That are not available to other wholesalers who handled McKesson products?

329 A. I would doubt that very seriously. I wouldn't know, but I would doubt it.

Q. Are there a number of competitor manufacturers of McKesson that you can classify as the principal competitors because they handle practically a complete line, item for item, that you handle?

A. No; I don't think so. McKesson, Bridgeport has competition in individual items rather than the whole line, although the closest thing to a competitive line would be Purepac, I would think.

Q. I was thinking of Purepac; and what about Dennison Laboratories?

A. I don't even know of Dennison Laboratories.

Q. Do McKesson wholesale drug divisions stock products competitively with McKesson products?

A. Sure.

Q. Do the wholesale drug divisions push the McKesson manufactured products in preference to the competitive products of other manufacturers that are also sold by the wholesale drug divisions?

A. The answer is not a simple one. There are times when we push competitive items over McKesson items, and there are times when we push McKesson items over competitive items. It depends what we are driving at the time. Generally speaking, we treat McKesson Laboratories about the same as we treat any other manufacturer.

Q. Do you have any set requirements or standards which a wholesaler must meet in order to buy McKesson products from a McKesson wholesale drug division?

A. Do we have?

Q. Yes.

A. Not that I know of.

Q. How do you determine if somebody comes in and says he is a wholesaler—

A. I think that is up to the local people. They know who the wholesalers are generally, who to sell and who not to sell.

Q. But if he is a wholesaler, there is no other?

A. "If"?

Q. No other.

A. If he is a wholesaler, I don't think there is any—well, I don't know. Just because somebody calls himself a wholesaler—

Q. It wouldn't not necessarily mean so?

A. That is right.

Q. If he is a wholesaler, do you know of anything, any other requirements?

A. Certainly not that we have established.

331 Q. I am going to show you Exhibit A, which is the form of fair trade contract which was in effect at the time the complaint in this case was filed, on May 27, 1952 [handing document to the witness].

A. This is a wholesaler fair trade contract.

Q. Yes. Did you participate in the decision to adopt that form of contract?

A. Not that I know of. There is no reason why I should.

Q. Well, did you?

A. I don't recall anything of that type. In fact, I think that is the first time I have ever seen it.

Q. Prior to the adoption of this form, did you have any discussion with Mr. Dewell or with the president of the company with respect to the question of whether the fair trade contracts with the wholesalers to whom the wholesale drug division sold McKesson products, should be entered into by the manufacturing division or by the wholesale drug divisions?

A. Would you repeat that again?

Q. Yes; that is a long question. I think I can state it more simply. Before this form was adopted, shortly before it was adopted, did you discuss with either the president of the
332 company or Mr. Dewell, the question of whether the fair trade contracts that you were going to use covering sales by your wholesale drug divisions to other wholesalers should be entered into by the manufacturing division or whether they should be entered into by the wholesale drug divisions? Did you discuss that with Mr. Dewell?

A. I don't recall any discussions of that type. In fact, I don't think I have ever very often discussed fair trade with Wilbur Dewell.

Q. You don't recall any discussion of the question of whether your wholesale divisions selling to wholesalers should be covered by fair trade contracts?

A. I am pretty sure that I was not involved in anything like that.

Q. A short while ago, I showed you Exhibit 5, where you said "Send Mr. Dewell a list."

A. This one right here [indicating]?

Q. Yes. Was that your idea to send that list to Mr. Dewell, or were you requested to?

A. I imagine that we were requested to do this, just like any manufacturer would request us.

Q. When you received that request, is that the first time you had under your consideration the question of the fair trade
333 agreements covering your wholesaler to wholesaler sales?

A. No; I remember much more about the Sunbeam contracts than I do about McKesson Laboratories, because this was a time when Sunbeam was asking us to get contracts from all our retailers, and we were having a hell of a time. I don't remember much about this one, but I remember about the Sunbeam case.

As I recall, we were just asked to supply this list. We had done it for Sunbeam, and I believe it was prior to this; I am not sure.

Q. This is a question which perhaps your counsel can answer; I am not sure that you know the answer; I raised it the last time. Was Exhibit A in effect at the time the answer was filed on September 26, 1952? That is, the manufacturers-wholesalers fair trade contract.

Mr. EHRLHARDT. Yes.

Mr. DOBY. The next question is: Is it not true that April 1953 was the date on which you changed from that form of contract to the form of contract attached to your affidavit, Mr. Ehrhardt?

Mr. EHRLHARDT. I believe it was April 1953.

Mr. DOBEY. That was the date?

Mr. EHRLHARDT. Yes.

334 Mr. DOBEY. I will mark this document as G14. It is a letter dated April 17, 1953, signed by Mr. Dewell, addressed to Northern Drug Company, Fargo, North Dakota.

(Letter dated April 17, 1953, signed by Mr. Dewell, addressed to Northern Drug Company, Fargo, North Dakota, marked "Exhibit G14" for identification, as of this date.)

Mr. SULLIVAN. May I see that, please?

Mr. DOBEY. Yes [handing letter to Mr. Sullivan].

Mr. DOBEY. Does not that letter represent the form of letter that went to wholesalers at the time the contract form was first changed in April?

Mr. EHRHARDT. It certainly looks like it. I don't think there is anything here to actually verify that.

Mr. DOBEY. Can we assume that it is, unless you advise me to the contrary later?

Mr. EHRHARDT. I would say yes; yes. I am almost sure. The only thing I would like to do is check it against the record.

Q. Do the wholesale drug divisions sometimes refer orders from other wholesalers for McKesson products to the manufacturing division?

A. I don't know. I would doubt it, but I don't know.

335 Q. Do the wholesale drug divisions ever seek to induce other wholesalers to purchase direct from the manufacturing division?

Q. Oh, I am sure they do not. I don't know, but that I am sure of. You can be sure they would not do that.

Q. Was McKesson fair trading McKesson products in Arkansas, Florida, Georgia, Michigan, Utah and Nebraska at the time the complaint was filed on May 27, 1952?

Mr. EHRHARDT. Off the record.

(Discussion off the record.)

Q. Did McKesson have a fair trade contract with respect to McKesson products with at least one retailer or at least one wholesaler in each of these states at the time the complaint in this case was filed on May 27, 1952?

A. I don't know.

Mr. SULLIVAN. To the extent that such a contract was legal, because the contract itself provided that if it was not legal in the state, it did not apply in the state.

Mr. DOBEY. But I am asking you whether one of your Exhibit A contracts—

Mr. McGRATH. For the sake of the record, the witness has denied knowledge. The activity before us is for the inter-
336 rogation of the witness. If you want to find out in some other way, what the answer is, let us take it up when we get through with the witness.

Q. I assume your answer would be "I don't know," to this one also: Does McKesson still have a fair trade contract with respect to McKesson products with at least one retailer or at least one wholesaler in each of these states?

A. I don't know.

Mr. SULLIVAN. You mean in effect?

Mr. DOBEY. A signed agreement.

Mr. SULLIVAN. In effect?

Mr. DOBEY. Unless it has been cancelled.

Mr. SULLIVAN. Then we get into another realm: Cancelled by what?

Mr. McGRATH. Mr. Dobey understands our position. There is no point in reiterating our position. You know what our position is. You don't expect us to admit we are violating the law, do you?

Mr. DOBEY. Off the record.

(Discussion off the record.)

Q. As to those States, Florida and Michigan, where the courts have held the fair trade laws unconstitutional as to nonsigners, but constitutional to signers, is McKesson continuing to fair-trade McKesson products as to signers?

Mr. McGRATH. Do you know?

The WITNESS. I don't know.

Mr. McGRATH. The witness does not know.

Mr. DOBEY. Do you want to answer it?

Mr. McGRATH. We can probably find that out for you.

Mr. DOBEY. Off the record.

(Discussion off the record.)

Q. I will put this question on the record: Has McKesson given any consideration or is McKesson giving any consideration to reviving the use of Paragraph 3 of Exhibit A in those states where the courts have held the fair trade laws invalid as to nonsigners, but valid as to signers?

A. I can't answer it.

Mr. EHRHARDT. May I answer that for the record, Mr. Dobey?

Mr. DOBEY. Yes, you can answer it for the record.

Mr. EHRHARDT. The answer is no.

Mr. DOBEY. Maybe you can answer my next question for the record: In those states where the courts have held the fair trade laws invalid as to nonsigners, has McKesson given any consideration or is McKesson giving any consideration to requiring purchasers from McKesson to agree to require their vendees in turn to maintain fair trade prices?

Mr. EHRHARDT. No.

Mr. DOBEY. Those are all the questions I have, and I would like to say I have enjoyed examining you.

(Whereupon, at 12:30 p. m., the examination was closed.)

342 to, and I also offer in evidence the defendant's answers to the plaintiff's supplemental interrogatories.

Mr. McGRATH. We have no objection, except to Questions 5 and 6 and the answers to those questions. Our objection to Questions 5 and 6 and the answers is that these questions and answers are immaterial, irrelevant and not within the issues raised by the pleadings, the questions being addressed to whether the defendant is violating the Fair Trade laws of certain states, which we say is not the charge in the complaint at all. The charge in the complaint is that because the defendant operates in a dual capacity as a manufacturer and also as a wholesaler that therefore its Fair Trade contracts are horizontal.

The COURT. How about that?

Mr. DOBEY. The charge in the complaint is that the defendant fixed wholesale and retail prices by contract and the defense is based upon immunity granted by the Miller-Tydings Act and the McGuire Act, but that immunity stands only where the defendant has the protection of valid state legislation to support it.

These questions were directed to the point that the defendant at the time of the complaint had Fair Trade contracts in
343 effect in states where the state Fair Trade laws have subsequently been held unconstitutional, leaving the defendant's Fair Trade contracts without any valid state legislation to support them, and, therefore, subject to the Sherman Act. In other words, the Miller-Tydings Act and the McGuire Act merely authorize—

The COURT. I will take them subject to objection and my own striking them out after I consider the case.

(Government's Exhibits G2A and G2B received in evidence.)

Mr. SULLIVAN. In introducing the answers to the interrogatories and the supplemental interrogatories did you include the exhibits attached thereto?

Mr. DOBEY. Yes, the complete answers, including the exhibits attached to the answers.

I offer in evidence the defendant's admission of facts.

(Government's Exhibit G3A received in evidence.)

Mr. DOBEY. I offer in evidence a stipulation of facts with respect to competition between McKesson wholesale drug divisions and other wholesalers.

Mr. McGRATH. No objection.

344 (Government's Exhibit G4A received in evidence.)

The COURT. I have no objection to your marking them in any way you wish, but what does the "A" have to do with it?

Mr. DOBEY. Our numbers are strictly numerical, whereas the first interrogatories had Exhibits A and B attached to them, and then the second set had Exhibits 1 to 7 attached to them. It would avoid any confusion if we use this manner of marking

The COURT. Very well.

Mr. DOBEY. I offer in evidence a stipulation of facts with respect to sales of McKesson products on single orders from retailers, amounting to \$1,000 or more.

Mr. McGRATH. We object to the admission of that stipulation on the ground that the material therein contained is not within the issues raised by the pleadings, and, therefore, irrelevant and immaterial, and in any event the material therein contained does **not constitute such additional evidence as Judge Murphy decided in his opinion on the motion for summary judgment it might require in order to constitute a violation.**

345 The COURT. I will overrule the objection.

(Government's Exhibit G5A received in evidence.)

Mr. McGRATH. May I note an additional ground of objection with respect to that exhibit: The facts therein stipulated do not obtain at the present time with respect to the terms of sales fixed by the defendant.

The COURT. Overruled.

Mr. DOBEY. I offer in evidence the deposition of Wilbur E. Dewell, the general manager of the defendant's manufacturing division, which was taken on February 10, 1955.

Mr. McGRATH. I would like to note an objection to the following portions of the deposition of Mr. Dewell upon the same grounds as stated with respect to the objection to the last exhibit: Page 36, beginning with the second question and ending on page 48 with the answer to the third question; page 63, commencing with the first question and ending on page 64 with the answer to the third question; page 70, the last sentence of the first answer, reading

346 "But they don't get any 20 percent on it"; page 79, commencing with the third question and ending with the answer to the last question on that page; page 90, commencing with the third question and ending with the statement of the witness on the same page; page 91, commencing with the first question and ending on page 93 with the answer to the first question; page 118, commencing with the second question and ending on page 122 with the answer to the first question.

I also object to the entire cross and redirect examination of the witness Dewell.

The COURT. Who is Dewell?

Mr. McGRATH. He is an officer of McKesson & Robbins, Inc., in charge of the manufacturing division. These questions are with relation to this term of sale.

The COURT. On what theory do you offer the deposition?

Mr. DOBEY. The motion for summary judgment on which the Government was able to move was based solely on an admission of fact.

The COURT. This is not a motion for summary judgment, this is a trial. Why isn't he here?

Mr. Dobey. Because I thought I could save a great deal of time.

The COURT. You do not make any objection on that basis?

347 Mr. McGRATH. I do not. I think the issues here are very narrow, and it was our feeling that we could present the deposition. I think the question is one largely of law. Indeed, if this Court is going to follow Judge Murphy, it is already largely determined.

The COURT. I hope so.

Mr. McGRATH. Except for this very narrow question of whether the defendant, in making sales direct to retailers, where the orders are \$1,000 or more they give a 20 percent discount, whether that constitutes the additional evidence that Judge Murphy found would have to be present in order to find an antitrust violation arising out of the dual capacity of manufacturer and wholesaler which the defendant occupies, we say that that is not evidence such as was called for by Judge Murphy. We say it is also an afterthought by the Government because there isn't a single thing in the pleadings with respect to it and, indeed, it was only discovered by the Government on the examination of Mr. Dewell. Those are the grounds for my objection to it. I think, in fairness to your

Honor, that you should not be expected under these circumstances, since we know what is in these papers and you do not, to make a final ruling at this time. I am quite content with your Honor making a ruling which will admit it subject to being stricken when you are in a position to determine the merit of the objection.

The COURT. That is what I will do.

(Government's Exhibit G6A received in evidence.)

Mr. DOBEY. I offer in evidence the deposition of Herman C. Nolen, executive vice president in charge of drug merchandising of the wholesale drug division, which deposition was taken on March 24, 1955.

Mr. McGRATH. I object to the following portions of Mr. Nolen's deposition upon the grounds already stated with respect to Mr. Dewell's deposition: Page 63, commencing with the third question ending on page 64 with the answer to the second question; page 65, the fourth question and answer; page 66, commencing with the first question and ending with the answer to the second question; page 67, commencing with the last question and ending on page 68 with the answer to the first question.

The COURT. Same ruling.

(Government's Exhibit G7A received in evidence.)

349 Mr. DOBEY. I offer in evidence Government's Exhibit for identification G8, which is a list of the sellers' published

net wholesale prices in effect on May 27, 1952, when the complaint was filed.

Mr. McGRATH. No objection.

(Government's Exhibit G8 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Exhibit G9 for identification.

Mr. McGRATH. I object to that upon the same grounds, namely, that it relates to this discount on orders of \$1,000 or more to retailers, which I say is irrelevant and not within the issues.

The COURT. Same ruling.

(Government's Exhibit G9 for identification in evidence.)

The COURT. What is that, a list of prices?

Mr. DOBEY. Prices at which the manufacturer sells direct to retailers.

I offer in evidence Government's Exhibit 10 for identification which is a price list showing the prices on the sales of McKesson products by the manufacturing division to wholesalers and also to retailers.

350 Mr. McGRATH. No objection.

(Government's Exhibit G10 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Government's Exhibit G11 for identification, which is a summary of sales made by the manufacturing division of McKesson & Robbins to retail accounts during the period July 1, 1951 to June 30, 1952.

Mr. McGRATH. No objection.

(Government's Exhibit G11 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Government's Exhibit G12 for identification, a letter from People's Drug Stores to the Department of Justice, dated March 10, 1955, and Government's Exhibit G13 for identification, which is a list of the locations of the retail drug stores of People's Drug Stores.

Mr. McGRATH. No objection.

Government's Exhibit G12 for identification received in evidence.)

(Government's Exhibit G13 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Government's Exhibit 351 G14 for identification, which is a letter from McKesson & Robbins Laboratories to the Northern Drug Co., dated April 17, 1953, with an attached manufacturer-wholesaler Fair Trade agreement.

Mr. McGRATH. No objection.

(Government's Exhibit G14 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Government's Exhibit 15, a manufacturer-wholesaler Fair Trade agreement bearing the notation in the upper lefthand corner "Fair Trade Form W453."

Mr. McGRATH. No objection.

(Government's Exhibit G15 for identification received in evidence.)

Mr. DOBEY. I offer in Evidence Government's Exhibit 16, which is a manufacturer-retailer Fair Trade agreement bearing the notation in the upper lefthand corner "Fair Trade Form R453."

Mr. McGRATH. No objection.

(Government's Exhibit G16 for identification received in evidence.)

Mr. DOBEY. I offer in evidence Government's Exhibit G17, which is a letter from McKesson & Robbins Laboratories, dated March 21, 1955, and attached Fair Trade price schedule, revised March 15, 1955.

352 Mr. McGRATH. No objection.

Mr. SULLIVAN. Will it be stipulated that that letter was sent to all wholesalers to whom McKesson & Robbins sells merchandise?

Mr. DOBEY. Yes.

(Government's Exhibit G17 for identification received in evidence.)

Mr. DOBEY. I understood originally that it was sent to all wholesalers who bought directly from the manufacturing divisions.

Mr. SULLIVAN. I thought that is what I said, to whom McKesson & Robbins Laboratories sells merchandise.

Mr. DOBEY. All right.

I offer in evidence Government's G18, which is a summary of sales of McKesson products by the wholesale divisions of McKesson & Robbins to other wholesalers during the period July 1, 1951, and ending June 30, 1952.

Mr. McGRATH. No objection.

(Government's Exhibit G18 for identification received in evidence.)

353 Mr. DOBEY. I offer in evidence Government's Exhibit G19, consisting of questions propounded by Mr. Dobey and Ehrhardt's answers thereto with respect to Fair Trading of McKesson products in certain states where the law has been held unconstitutional in whole or in part.

Mr. McGRATH. I object to this upon the ground that there is no charge in this action of an antitrust violation based on the facts contained in that exhibit.

The COURT. Same ruling.

(Government's Exhibit G19 for identification received in evidence.)

Mr. DOBEY. Now I should like to offer Government's Exhibits G20 to G30, inclusive, in evidence. These exhibits are all of the same type, consisting of letters to the Department of Justice from retailers purchasing McKesson products direct from the manufacturing division; and a list of locations of retail drug stores attached to each letter.

These letters and attachments are offered pursuant to a letter stipulation of defense counsel that they will waive the hearsay objection and reserve their right to object on the ground of relevancy and materiality. Actually, they are the same type of letter as was already admitted from People's Drug Stores, Exhibits G12 and G13.

Mr. McGRATH. No objection.

(Government's Exhibits G20 for identification to G30 for identification, inclusive, received in evidence.)

PLAINTIFF RESTS

Mr. DOBEY. The Government rests, your Honor.

MOTION TO DISMISS AND RULING THEREON

Mr. McGRATH. The defendant moves to dismiss the complaint upon the ground that on the facts and on the law a cause of action has not been established.

The COURT. I will reserve decision.

Mr. McGRATH. The defendant rests and renews the motion made at the close of the plaintiff's case and also moves for judgment.

The COURT. I will reserve decisions on both of those motions.

Mr. McGRATH. Would your Honor at this time like to hear what the case is all about or would you just like to take it on the papers?

The COURT. I would like to hear you. Suppose we take five minutes out so you can collect your thoughts and then you can give it to me briefly as you can.

(Short recess.)

355

ARGUMENT OF MR. DOBEY

Mr. DOBEY. Do you have some questions you would like to ask me, your Honor?

The COURT. I do, but I am a very careful man, and I don't think I will. I probably will have some questions after I consider the papers.

You answer the questions you think I ought to ask.

Mr. DOBEY. Is Judge Murphy's opinion the law of the case and is the reasoning he followed with respect to the matter of competition between McKesson and wholesalers the reasoning controlling here in this court? That is the first question.

Our position is, one, it is not the law of the case because the Supreme Court has within the past two years or so indicated that it takes a final judgment for a law of the case, and in this case Judge Murphy left the whole case open for further development of the facts. The facts with respect to the competition between McKesson—

The COURT. You say it takes a final judgment to determine the law of the case?

Mr. DOBEY. Yes, sir.

The COURT. Why would the question ever arise?

356 Mr. DOBEY. In *United States v. United States Smelting Refining & Mining Company*, 339 U. S. 186 (1950), the Supreme Court said: "This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable." Then it went on further to say: "We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*."

I frankly cannot answer your question, if that is true, why there would be any room for application of the law of the case, because I do not have the answer to that.

The COURT. I suppose what they mean is that a judge rendering final judgment is bound by decisions made along the line he thinks is the law of the case and the Supreme Court thinks not. That is all I can make out on that.

Mr. DOBEY. Assuming that that statement by the Supreme Court that it does require final judgment is correct—of course there was no final judgment here. In any event, it seems to me where the case is left open for further development of facts
357 under the earlier Supreme Court decision which we cited on this law of the case, the Government should not be precluded from reviewing the same question of law upon the further development of the facts, or, I should say, upon the fuller development of the case when the facts are decided on the merits.

The COURT. Why should I disagree with Judge Murphy? What was wrong with his decision?

Mr. DOBEY. I will go into the merits of the first point, and I will tell you why I think you should not follow his reasoning. He states that you must find some additional restraint destructive of competition in order to determine that the contracts are illegal. The statute says that Miller-Tydings does not apply and McGuire does not apply as to Fair Trade agreements on any commodity

between persons in competition with each other. That language is clear. It is unambiguous. McKesson is in competition with these other wholesalers.

At the time Judge Murphy decided the case, we showed by the admission of facts that McKesson was in competition with some of the wholesalers, that its wholesale drug divisions were in competition. We since that time fully established that
 358 it was also in competition with other wholesalers that were not covered at the time of Judge Murphy's opinion, that the wholesale drug divisions were in competition with other wholesalers.

We also established since that time that the wholesale drug divisions sales of approximately \$200,000 of McKesson products to other wholesalers, sales that were made by the wholesale drug divisions, were made to wholesalers who were competitors of the McKesson drug divisions. That was not established at the time of Judge Murphy's opinion.

We have in addition established that the manufacturing division itself is in competition with the independent wholesalers by selling direct to chain stores who have local stores and their headquarters in the same city or in the same trading area as the independent wholesalers. So we not only have competition between the wholesale drug divisions of McKesson with these other wholesalers but we have competition between the manufacturing division of McKesson and these other wholesalers. We are just all the way on competition between McKesson and these wholesalers who are bound by these Fair Trade agreements, so
 359 that McKesson is in competition with the other wholesalers, and the statute says clearly, unequivocally, unambiguously, that Miller-Tydings and also the McGuire Act do not apply as to price agreements on any commodity between persons in competition with each other.

I think Judge Murphy took the position, and the Federal Trade Commission has recently taken the same position after the majority had gone the other way, that after Judge Murphy's opinion they took the same position as he in the Eastman-Kodak case that competition is not enough, although the Eastman-Kodak case does not present some of the strong features from the Government's standpoint.

There the retail stores of Eastman-Kodak are separately incorporated, and they sell in competition with other retail independent stores that handle Eastman products. There are other differentiating features which makes this case much stronger. I won't take the time to point them out.

I will say that taking the Federal Trade Commission decision on Eastman-Kodak together with Judge Joseph's opinion in the

Aljan case, and Judge Murphy's opinion—the reasoning there followed is this: There are a lot of manufacturers in the country who sell at two levels of distribution. Then they say, since there are a lot of manufacturers in the country who sell at two levels of distribution, we must assume that Congress did not act in a vacuum, and we must assume that Congress knew about that, about the fact that there are lots of manufacturers selling at more than one level of distribution, and if Congress, as we assume, knew about that, then surely Congress did not intend to leave this large group of manufacturers who sell at two levels of distribution outside of this privilege granted by the Miller-Tydings Act and the McGuire Act. We say that reasoning is all wet, because in the first place, in legislative history—there just isn't sufficient or adequate legislative history to override the clear language of the statute. They have one colloquy between Senator Sparkman and Senator Humphrey at the time the McGuire Act was passed, after this complaint was filed, and that tends to support their position, but that is all they got.

They do not have anything on the original Miller-Tydings Act. That one colloquy was made by two members of the Senate who had nothing to do with either bill, they were not on either of the committees that considered the original Miller-Tydings Act or the subsequent McGuire Act.

The COURT. That would indicate it was a matter of common knowledge.

Mr. DOBEY. They discussed the legal situation actually with respect to this specific case, they didn't mention the case by name. Actually, if you review that legislative history—and I don't intend to do it in detail now, because it would take much time, but I did it in the motion for summary judgment—all you will find to support their position is that single colloquy.

I recall one exchange when the Miller-Tydings Act was being considered in committee between the counsel for the National Association of Retail Druggists, one of the leading proponents of the bill—and the committee, and this colloquy was to the effect that the Act only granted this privilege to persons not connected with the same type of operation, which is right on the point.

Here you have McKesson connected with both types of operation. However, that language was that it only applies to persons connected with the same type of operation.

Then there is other language in the legislative history to the effect that the contracts in discussion must be purely vertical. I emphasize the word "purely," because here they are not purely vertical.

For example, they control the retail price of McKesson products sold by the wholesale drug divisions to other wholesalers,

and there you have a clear element of horizontality, it is definitely not purely vertical.

In addition to that, the horizontal feature is emphasized by provisions in the contracts which in effect means that McKesson has to give independent wholesalers reasonable notice whenever McKesson changes its own wholesale published prices. That means that McKesson itself cannot make an original sale on McKesson products, not a resale, but an original sale, without giving notice to their competitors.

Miller-Tydings and McGuire only extend to resale price agreements. There is nothing in there authorizing any kind of restriction on an original sale price of a product by the manufacturer. That is a clear element of collusion on a horizontal basis. It demonstrates the horizontal character of the agreement.

363 Defense counsel attempt to meet that by saying, "When we ship products from the manufacturing division to the wholesale drug divisions, we treat that as a sale. We bill them, and then they send a check to our home office in New York, and it is just like a sale of McKesson products to independent wholesalers."

We say, oh, no, it is not a sale, because McKesson cannot sell something to itself that McKesson already owns. As a matter of fact, their case collapses on that specific point, unless your Honor rules that a corporation can sell a product to itself, because Miller-Tydings and McGuire only authorize resale price agreements under certain conditions, whereas here you have a restriction upon McKesson's own original salesprice for the first sale of a product to McKesson. They cannot change their public prices without giving reasonable notice to their competitors who are handling the same product.

I should like also to point out that either Judge Murphy or his law clerk completely misread the Supreme Court's decision in the Masonite case, because there is a clear misstatement of the facts of that case in Judge Murphy's opinion. Judge Murphy
364 said that case involved an arrangement between competing—

The COURT. I don't think you need go into that.

Mr. DOBEY. I want to point out also that while we say the language of the statute is clear, and we think it is as clear as anything could be, if there is to be any interpreting of that Act of any special consideration to be given of interpretation this way or that, that provision about persons in competition with each other was put into the bill by the Department of Justice in conference with Senator Tydings, and only when that provision was put in there did the Administration at that time withdraw its opposi-

tion to the bill, and at that time the bill did not go through because of the opposition.

Shall I pass on to the additional restraint?

The COURT. I think so.

Mr. DOBEY. There was a statement in Judge Murphy's opinion to the effect that the Government must prove some additional restraint destructive of competition in order to prove the contracts were outside of Miller-Tydings. We inquired into the matter

when we were faced with Judge Murphy's opinion—we
365 did not think we needed an additional restraint—finding

that we do, we inquired into the facts and we found that the manufacturing division of McKesson was selling McKesson products in greater quantities to retailers than it was selling McKesson products to wholesalers, and it was selling these products on orders of \$1,000 or more and at 20 percent discount from the list, whereas their wholesale Fair Trade prices provided for a maximum discount of 10 percent and 5 percent from list. In other words, McKesson was undercutting its own Fair Trade prices in selling to chain stores and was engaging in unfair competition with the independent wholesalers.

The COURT. Is there any reason why you didn't amend your complaint?

Mr. DOBEY. Yes, sir, I don't think it needs amending.

The complaint charges illegal price-fixing by price-fixing contracts. Now the question is—I should say, there was resale price-fixing contracts—the only question is whether those contracts are entitled to the immunity of Miller-Tydings and McGuire. They have to be entitled to that immunity, otherwise we win. They

are not entitled to that immunity unless McKesson prod-
366 ucts are sold in free and open competition, and here they

were not being sold in free and open competition. They were being sold in unfair competition with the independent wholesalers at prices below the prices which the independent wholesalers were required by McKesson to pay.

There are two decisions which are cited in the brief, the Gillette case and the Ciba case, where the Court held that that type of practice nullified the provisions of Miller-Tydings and McGuire. We say if what they are doing is a nullification of the Fair Trade Law rather than in accordance with its purpose, they certainly have no protection under the law of the Sherman Act. They have no protection because the products are not being sold in open and fair competition. They are still under agreements restraining competition with themselves.

After Mr. Dewell's deposition on that point, after we made our record on it, when we took the next deposition of Mr. Nolen, McKesson offered an exhibit whereby they eliminated their Fair

Trade prices with respect to sales of McKesson products amounting to \$1,000 or over on a single order, and I think that practically amounts to a confession of guilt on this point. However, I don't think they solved their problem, because I think their new Fair Trade system, whereby they are going to Fair Trade their product up to sales of \$1,000 and not Fair Trade them over \$1,000 is also beyond the intent and purpose of Miller-Tydings and McGuire. What it obviously means is that they intend to allow the large chain store buyers to buy at non-Fair Trade prices, whereas the independent retailers with one store will buy at fixed Fair Trade prices.

I think that is probably worse than the way they had their system at the time we took Mr. Dewell's deposition. It is equally clear if not more clear that that type of arrangement is in contravention of the basic provisions of Miller-Tydings and McGuire.

Would you like to ask me any questions, your Honor?

The COURT. Not now.

MR. DOBEY. There was a boycott provision in the case, which was with respect to a provision in their contract at the time the complaint was filed, which was removed after the complaint was filed. Do you care for any discussion on that point?

The COURT. No.

ARGUMENT OF MR. McGRATH

368 MR. McGRATH. Judge, I would just like briefly to set the posture of this case in the general Fair Trade controversy—let us call it that—which involves legislation and litigation. This case was started in May 1952. At that time the Miller-Tydings Act was in effect. The McGuire Act had not yet been passed.

The year previously the Supreme Court of the United States had shorn the Miller-Tydings Act of some of its effectiveness by saying that it was unconstitutional to try and impose the obligations of a price-fixing Fair Trade agreement upon a nonsigner. That was determined in the Schwegmann case.

Of course, we start with the Sherman Act, which forbids agreements in restraint of trade. The Miller-Tydings Act had the effect of validating state laws which authorized price-fixing on branded products which were in open competition. The Schwegmann decision having shorn the Miller-Tydings Act of certain of its effectiveness, Congress was considering new legislation so as to fill the gap which resulted from the Schwegmann case.

While Congress had under consideration this problem the present lawsuit was started in May 1952. Now, it is a test case.

369 You might just as well recognize it as a test case.

The purpose of the case is to test one aspect of the Fair Trade area, namely, whether a producer who is also a wholesaler or where someone in business operates at two functional levels, whether they can impose Fair Trade prices on their products.

Now McKesson & Robbins being both a manufacturer and a wholesaler provides a classic opportunity for testing the Government contention that where there is operation at two levels there is no protection in the Miller-Tydings Act.

There were two other situations which were more or less contemporaneous, one involving Doubleday, Doran, the book people who made books and who also had retail outlets, and the other involving Eastman-Kodak, which manufactures film and camera supplies, and what not, and also has retail outlets. They operated at two levels of distribution and manufacturing and therefore were in a dual capacity.

After this lawsuit was started, which, apart from this boycott thing which is no longer in the case, merely set forth the accusation that McKesson operated at the manufacturing whole-
370 sale level and therefore was not entitled to protection under the Miller-Tydings Act, then along comes McGuire.

The McGuire Act was passed in the summer of 1952, and that validated what the Schwegmann case had said was unlawful, and the McGuire Act carried over substantially the same language as Miller-Tydings with respect to the prohibition of so-called horizontal dealing.

As I understand the philosophy of this Fair Trade thing in a few words, it is that the Government will condone, the Federal Government will condone a restraint of price competition where states authorize it provided there is complete freedom of brand competition. Where two products manufactured by competing manufacturers, each having their brand name and having good will and being supported by substantial investments, are competing for the same product, the Government apparently feels that they are entitled to protection against price-cutters. That was the purpose of the McGuire Act. That was the purpose of Miller-Tydings.

Since that was the purpose, it seems fair to ask the question whether the Government would undertake to deal with a
371 small segment of that problem or the Legislature would deal with a small segment of the problem and at the same time exclude a very large segment of the problem from protection. Chairman Howrey of the Federal Trade Commission puts it this way: "The merchandising practices of respondent are in no sense unique." He was speaking of Eastman-Kodak. He says that the practice of dealing at two levels of distribution is a generally accepted business practice.

He states: "This common business practice was well known and generally accepted at the time of the enactment of the Miller-Tydings and the McGuire Acts. In determining intent there is a strong presumption that Congress does not act in a vacuum and is fully informed as to contemporaneous conditions of common knowledge."

He reaches the conclusion that the Miller-Tydings Act and the McGuire Act were never intended to withhold their protection from the manufacturer who also was active at another level of distribution. I am handing up the Eastman-Kodak decision for your Honor's use.

372 The Government tries to read the statute very narrowly and says that so long as the parties to the price fixing agreement are in the slightest bit of competition with each other the protection of the McGuire Act does not apply. The proof that ~~was~~ not the contention of Congress is found in the statement by Senator Humphrey, in which he said, "Many producers of trade-marked items sell them to consumers, retailers and wholesalers alike."

"Under the bill"—and he is talking about the McGuire Act—"such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers."

In other words, what is forbidden is an agreement between two wholesalers at the horizontal level conspiring to restrain the price of competitive products. The mere fact that a manufacturer imposes a price fix which is applicable to everybody at the wholesale level, and also a price fix which is applicable to everybody at the retail level, whether the retailer buys from a wholesaler or buys direct from the manufacturer, is certainly within the contemplation of this law as the Senator expressed it because we
373 are dealing with vertical contracts, we are dealing from one level of distribution upstream or downstream, whatever the case may be, to the next one.

Senator Humphrey said that was all right. The Government says, well, that is the comment of a single legislator and should be disregarded as such. However, I invite your Honor's attention to a Supreme Court decision just made on April 25th of this year in 75 Supreme Court Reports 591, where the Supreme Court took just such a statement of a member of Congress as to what Congress was trying to accomplish by the bill; that is, they took that as their guide in interpreting the legislation. By the way, that involved an immigration problem.

So that it seems to me at least when we point out what Senator Humphrey said, we know what one member of Congress was trying to accomplish by it. It should not be discarded as having

no value, particularly when there is no countervailing evidence of the intention of Congress on the other side.

Judge Murphy had everything before him that your Honor has now, except this term of sale which gives a direct buying retailer who buys more than \$1,000 worth in one order a 20 percent discount. I am going to come to that in a minute. However,

before I do, I want to talk a bit about the effect of Judge
374 Murphy's opinion. He said, "Since every Fair Trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the true test of legality in the situation of the producer-wholesaler of dual capacity is whether some additional restraint destructive of competition is occasioned."

In other words, he says, "Mr. United States, show me why the producer-wholesaler is guilty of any greater restraint than the producer alone when he price-fixes."

I take it that is the burden that the Government must sustain on this trial if Judge Murphy is to be followed.

I say they have failed completely in meeting that burden.

On the question of whether Judge Murphy is to be followed or not, I don't make any argument about the law of the case. I think I have some idea what the law of the case means, but I don't want to put this on any technical basis. I have long since learned not to tell a judge what he cannot do, because he is apt to try to find a way to do it.

375 I believe Judge Murphy is entitled to be followed because his reasoning is sound. I think you can have the law of the case before a final judgment if a decision of an intermediate character is made in a case and it is appealable and the party fails to appeal. From that point on that is a settled issue in that case, so I don't think you need a final judgment.

However, I think while you can still review what a court has decided, it is still an open question, and I think what Judge Murphy has decided in this case is still certainly subject to review and appeal. Therefore, it may very well be what your Honor has before you with respect to Judge Murphy's decision is a question of policy rather than a question of binding obligation. However, take it either way, I would not be urging the soundness of Judge Murphy's decision unless I thought it was absolutely sound. I stand on it for that reason and I invite your Honor to do the same.

Assuming the soundness of his decision, we pass on to the sole inquiry that is left in this case, namely, whether proof of the fact that when McKesson wholesale laboratories makes a sale to

376 a retailer in an amount of \$100,000 or more and gives it a 20 percent discount, it furnishes the Government with such additional restraint of competition as to comply with the prerequisite set down by Judge Murphy. When you analyze that transaction which the Government cites, that does not depend upon the

dual capacity of McKesson at all. If McKesson were never in the wholesale business, but were merely a manufacturer, it could still make a sale to a retailer and give it a 20 percent discount if he ordered \$1,000 or more. I don't even ask your Honor to stand on that. I say we ought to look at the realities of the situation.

Why does McKesson say to a retailer, "If you order \$1,000 or more from me, I will give you a 20 percent discount"? The reason is because that particular retailer is a very special retailer. The average retailer orders about \$45. When a retailer orders \$1,000 or more at one time the chances are he is a chain buying for several outlets and not only one, and is performing a warehousing function, and therefore is performing some of the functions of a wholesaler as well as a retailer.

The wholesale houses buying from McKesson, the manufacturer, get a 25 percent discount on their purchases, so it is not unreasonable to give a 20 percent discount to a retailer who buys in large quantities and therefore performs some of the normal functions of a wholesaler.

Quite apart from that, if the Government has any complaint about this 20 percent discount to a retailer buying \$1,000 or more, it can only be that it is not binding itself to the prices that it fixes for other wholesalers. That is what they call in equity, having clean hands, in other words, if you don't oblige yourself to do the same thing that you impose on other wholesalers, well, then, you vitiate the price-fixing arrangement that you have attempted to impose on them, and you cannot enforce it, because you have to come into equity to enforce it with clean hands, and the books are replete with decisions establishing that doctrine.

However, there is a vast distinction between being entitled to a remedy because of your own conduct and being guilty of an anti-trust violation. I say it may be that the attempted imposition of a price fix on the other wholesalers might be weakened or vitiated by this term of sale, but in no event is it a violation of the antitrust statutes, and that is what your Honor has before you in this case.

And, of course, the final observation with respect to this 20 percent discount is that when the Government started making a point about it in connection with the examinations before trial, we sent out a notice to our wholesalers terminating it because it is a matter of such rare occurrence that it did not mean anything to us. Therefore, we just took it out rather than argue about it.

Now, the Government says that taking it out is worse than leaving it in. That observation of the Government is characteristic of this lawsuit, and, frankly, I don't hesitate to say most respectfully that I don't like this lawsuit, because a complaint that was served in May 1952, despite all the changes that have come about

since then, is still the complaint which we are expected to meet, despite the changed conditions, despite the fact that there is no longer any boycott, despite the fact they make no complaints against us violating state laws in any document they have served on us, and after Judge Murphy's decision, we are confronted with a situation where the Government is clutching straws to sustain what started out to be a test case.

379 I say that is unseemly, and I think that this case should be tried on the issues that were originally posed, that those issues originally posed should be fixed; rather than trying to clutch at straws and introduce new issues to try to keep the breath of life in a case which has already expired with the rendition of Judge Murphy's opinion.

The question that was raised in this test case was a question of law, as to whether the dual capacity of the manufacturer or wholesaler was within the protection of the Miller-Tydings Act and later the McGuire Act.

I say that is the only issue to which this Court should address itself. I say that simplifies the problem of the Court because that issue has already been determined by Judge Murphy, and that therefore the defendants have judgment.

Thank you.

The COURT. I will reserve decision.

[Reporter's certificate to foregoing Transcript omitted in printing.]

380 United States District Court, Southern District of New York

UNITED STATES OF AMERICA, PLAINTIFF

against

McKESSON & ROBBINS, INCORPORATED, DEFENDANT

Opinion

June 3, 1955

381 CLANCY, D. J.:

FINDINGS OF FACT

1. Defendant, operating through 74 divisions located in 35 states, conducts nationwide, a wholesale business in drugs, pharmaceutical, surgical and medical supplies, toilet articles and sundry other items customarily sold in drug stores.

2. Defendant also manufactures its own line of drug products which are packaged and sold under its brand name of "McKesson Products". Large annual gross sales of its own products are

made by its own wholesale divisions, other wholesale competitors and directly by it to large retailers.

3. With both the wholesale competitors and the large retailers, defendant, in accord with the Fair Trade laws of the several states permitting them, enters into fair trade price fixing agreements affecting retail sales of its own products.

4. Defendant's fair trade contracts for the sale of its own products to wholesalers provide for a maximum resale discount of ten and five percent. Defendant's fair trade contracts with retailers provide for a discount of twenty percent for purchases in excess of \$1,000. Defendant's retail customers are mostly chain stores. Some sales of \$1,000 or more of its products are made by other wholesalers to retailers but such instances are rare.

5. Immediately after the decision of the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, defendant employed a fair trade agreement with its wholesaler purchasers which contained a clause adapted to control the sales price to successive purchasers of its products. This action was started in May, 1952. The McGuire Act was passed in July, 1952. Defendant stopped using the clause in April, 1953. The accused clause of the contract employed by the defendant during this period was on its face an effort to meet the Schwegmann decision. Defendant's position was that of all manufacturers in that its rights under the anti-trust laws and the state fair trade laws were indeterminate and unsettled. Its discontinuance of the use of its clause was not too long after the McGuire Act was enacted, and there is no reason now to assume the possibility of further use of it. After reading the disputed clause, the Court is of the opinion that to render any decision on the legality of its use by the defendant in this case in the circumstances in which it operated from 1951 to 1953 would be futile. So would be the award now of an injunction against its reuse.

6. Defendant has had price fixing agreements in some states which, since the commencement of this action, have declared their fair trade laws unconstitutional. There is no evidence in this case that defendant has entered into or continued any fair price contract in any state after the local fair trade law was declared unconstitutional. In fact, the defendant's contracts now provide that they are only binding if legal under the state law. Again, the Court sees no reason why this defendant should be admonished for accepting a legislative enactment as constitutional until it was found not to be.

CONCLUSION OF LAW

1. Judgment is granted dismissing the complaint.

The Government in this case moved for summary judgment on the theory that any price fixing agreement which was made with competing wholesalers by defendant as a wholesaler as well as a manufacturer, was a per se violation of the Sherman Act.

Judge Murphy, denying the Government's motion, said: "The heart of the problem presented rises from defendant's dual role as manufacturer and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of defendant's capacities is carefully considered and the other happily ignored. * * * Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-
384 wholesaler is insufficient to make out a prima facie case of restraint of trade under the Sherman Act. Are all such agreements privileged or only some of them? If the latter, what then is the line of demarcation between valid and illegal ones? We think the test consists of a factual showing of illegality."

Judge Murphy's ruling that fair trade price fixing by a producer—wholesaler was not per se illegal under the Sherman Act, was necessary to his decision of the motion, and we regard it as the law of the case. In any event we concur in and adopt his decision.

The only question that remains after the trial of this case is, did the Government make out a "factual showing of illegality" by proving some additional restraint of competition by the defendant which, in conjunction with their fair trade price fixing, would constitute a violation of the Sherman Act?

The Government has submitted proof that the defendant as a producer entered into fair trade contracts with large retailers which provided for a 20 percent discount for purchases in excess of \$1,000. Defendant's fair trade contracts with independent wholesalers allow a discount of 10 and 5 percent off list. It is the Government's contention that this is an additional restraint that renders the defendant's entire fair trade system a violation of the Sherman Act.

The defendant contends that the evidence of this discount to large retailers is not relevant or material under
385 the allegations of the Government's complaint. An examination of the complaint shows that it was directed at defendant's fair price agreements with competing wholesalers. In fact, paragraph 8 of the complaint lists only independent wholesalers as co-conspirators. The Government's new claim makes them the injured victims of conspiring retailers though nowhere in the complaint is there any mention of a conspiracy or agreements with retailers. But the Government insists that the proof is coherent and within the issues in that the difference in defendant's discounts to wholesaler and retailer buyers infects all the

wholesalers' fair trade agreements, making them instruments for illegal restraint.

Accepting this theory, we hold that the proof submitted does not show the additional restraint it is intended to demonstrate.

There is nothing in the evidence submitted by the Government which would support a finding by this Court that this difference of discount by itself or in conjunction with defendant's fair trade price structure in any way restricts competition more than does any fair trade price system.

Defendant vouchsafes the explanation that the 20 percent discount merely reflects the fair value of the wholesaler's services in warehousing and handling performed by the large retailer and that such a retailer is not a potential customer of the independent wholesaler. The Government contends that it is used by the defendant to eliminate the competition of the independent wholesalers for the large retail business.

Whether the difference of discount is a fair and legitimate quantitative price discount in no wise affecting competition or is a means of restricting competition, this Court has no way of determining. The few facts do not speak for themselves. The burden of proof was the Government's. The complaint must be dismissed.

Dated: New York, N. Y., June 3, 1955.

JOHN W. CLANCY,
United States District Judge.

Judgment entered:

WILLIAM V. CONNELL,
Clerk.

JUNE 6, 1955.

387 In the United States District Court for the
Southern District of New York

Notice of motion to make additional findings

Filed June 22, 1955

[File endorsement omitted.]

[Title omitted.]

Please take notice that the undersigned will move the Court in accordance with the attached Motion to Make Additional Findings of Fact on the 22nd day of June 1955 at Room 706, United States Courthouse, Foley Square, Borough of Manhattan, City, County and State of New York at 10:00 a. m., or as soon there-

after as counsel can be heard for an order granting said motion and for such other and further relief as may be just and proper.

Dated: New York, New York, June 14, 1955.

Yours etc.

Richard B. O'Donne

RICHARD B. O'DON

Special Assistant to the Attorney General, Room 132, U. S. Courthouse, Foley Square, New York, N

ALLEN A OBEY,
E. WIN & TURNER,
JOHN J TURNER,
Trial Attorneys.

WORTH ROWLEY,

Special Assistant to the Attorney General.

To Hodges, Reavis, McGrath, Pantaleoni & Downey, 20 Pine Street, New York 5, New York, Attorneys for McKesson & Robbins, Incorporated.

Service acknowledged and copy received this 14th day of June 1955.

Hodges, Reavis, McGrath, Pantaleoni & Downey,

HODGES, REAVIS, McGRATH, PANTALEONI & DOWNEY,

*Attorneys for Defendant,
McKesson & Robbins, Incorporated.*

388 In the United States District Court for the Southern District of New York

Motion to make additional findings

Filed June 22, 1955

[Title omitted.]

The United States of America, plaintiff, by its attorneys, pursuant to Rule 52 (b) of the Rules of Civil Procedure, hereby moves the Court to make additional findings of fact in the above-entitled action as set forth below in the paragraphs numbered 1 to 12, inclusive.

The grounds upon which this Motion is made are that the requested additional findings of fact are fully supported by the evidence and will clarify the Record for the purposes of the plaintiff's appeal.

1. The defendant is the largest drug wholesaler in the United States and there are no other drug wholesalers in the United States of comparable size (Nolen, p. 35). The defendant operates 74 wholesale drug divisions located in 35 states (par. 4 of Answer to Complaint, Nolen, p. 62). The defendant is also a manufacturer of a line of drug products, hereinafter referred to as "McKesson

products". The defendant's wholesale drug divisions and the defendant's manufacturing division (which is located at Bridgeport, Conn.) are not separately incorporated (par. 1 of Answer to Supplemental Interrogatories).

2. For the fiscal year ended March 31, 1954 the sales of all drug products by McKesson's wholesale drug divisions amounted to \$338,000,000 (Nolen, p. 34), while the sales of McKesson products by the manufacturing division for the same fiscal year amounted to \$11,000,000 (Dewell, p. 8). This figure of \$11,000,000 included "sales" of McKesson products by the manufacturing division to the defendant's own wholesale drug divisions (Dewell, p. 8). The defendant, in addition to distributing McKesson products through its own wholesale drug divisions, sells McKesson products from its manufacturing division direct to 21 independent wholesalers. (Answers 7 and 8 to First Set of Interrogatories).

389 For the fiscal year ending June 30, 1952 the defendant's sales of McKesson products to these independent wholesalers amounted to \$763,767. (Answer 1 to First Set of Interrogatories). The defendant's wholesale drug divisions are in competition with all but 5 of these 21 independent wholesalers. (Admission of Facts, Stipulation of Facts).

3. The defendant's wholesale drug divisions, in addition to selling McKesson products to retailers, also sell McKesson products to other wholesalers (G. 5, par. 16 of Answer to Supplemental Interrogatories). For the fiscal year ending June 30, 1952 the aggregate sales of McKesson products by the wholesale drug divisions to other wholesalers amounted to about \$200,000 (par. 18 of Answer to Supplemental Interrogatories, G. 18). The defendant's wholesale drug divisions are in competition with the other wholesalers to whom they sell McKesson products. (Nolen, pp. 50, 51, 55).

4. The defendant's manufacturing division, in addition to distributing McKesson products through the McKesson wholesale drug divisions and selling such products to independent wholesalers, also sells McKesson products directly to a select group of retailers who are considered "desirable accounts" by the manufacturing division (Dewell, p. 30). This type of business is actively solicited by salesmen of the manufacturing division (Dewell, pp. 25, 26, 27, 28, 71), who do not contact retailers whose probable purchases are going to be small. (Dewell, p. 70). Whether the manufacturing division will sell a particular retailer on a direct basis depends upon to what extent the retailer will "cooperate" with the manufacturing division (Dewell, p. 31), what facilities the retailer has for taking in and handling the quantities of McKesson products required for direct sales (Dewell, p. 32), what the retailer will do in the way of "pushing" McKesson products (Dewell, p. 32), what "commitments" the retailer will make

(Dewell, p. 33), whether the retailer will promise to display the merchandise, present it to the public, and encourage the retailer's clerks to sell McKesson products (Dewell, p. 35), and whether the retailer will carry a full representative line of McKesson products (Dewell, pp. 72, 73, 74).

390 5. The retailers who are permitted to purchase McKesson products directly from the manufacturing division of McKesson consist for the most part of large chain drug stores and large syndicate stores (G. 11 and G. 26-30, inclusive). The sales of McKesson products by the manufacturing division direct to retailers for the fiscal year ended June 30, 1952 amounted to \$1,352,521 (G. 11 and Annex to Item 19 of Answer to Supplemental Interrogatories), and were in excess of the defendant's sales of McKesson products to independent wholesalers which amounted to approximately \$963,767 (including estimated sales of \$200,000 by the wholesale drug divisions to other wholesalers).

6. Direct retail accounts of the manufacturing division, on single orders for McKesson products of \$1,000 or more, receive a discount of 20% off list (G. 9), whereas the maximum discount allowed by the wholesale drug divisions of McKesson is 10% and 5% from list which is the maximum allowable discount under the defendant's fair trade price schedules for McKesson products (Dewell, p. 43). An independent wholesaler could not sell McKesson products at 20% from list without violating his fair trade agreement with McKesson (Dewell, p. 43). The defendant's published net wholesale prices, which are the defendant's fair trade prices, are applicable to both independent wholesalers and McKesson's wholesale drug divisions (Dewell, pp. 90, 91).

7. The flat 20% discount, which is allowed only to the direct retailer customers of the manufacturing division (Dewell, p. 91), applies only where the order is for \$1,000 or more (Dewell, pp. 36, 37), but the manufacturing division will honor an order from a retailer for a smaller quantity at the wholesale price (Dewell, pp. 36, 37).

8. On February 10, 1955 the government took the deposition of Mr. Wilbur E. Dewell, the defendant's Vice President in charge of the defendant's manufacturing division, and examined Mr. Dewell at length concerning the discounts which the manufacturing division allowed to its direct retailer customers. On March 21, 1955, after the taking of Mr. Dewell's deposition, the defendant issued a new fair trade price schedule which
391 provides that the defendant's fair trade prices do not apply on single orders of \$1,000 or more (G. 17). Prior to March 21, 1955 the defendant had never advised independent wholesalers that their fair trade agreements did not apply to

sales to retailers where the order was for \$1,000 or more (Dewell, p. 125).

9. Although until March 21, 1955, McKesson's fair trade agreements with independent wholesalers provided for a maximum allowable discount on sales to retailers of 10% and 5% from list, and although McKesson's own wholesale drug divisions observed these same fair trade maximum discounts of 10% and 5% from list (applicable to orders of \$250 or more), nevertheless in some instances some independent wholesalers and some wholesale drug divisions of McKesson have filled single orders from retailers for McKesson products amounting to \$1,000 or more, although such instances have been rare (Stipulation of Facts). These orders of \$1,000 or over have been filled by independent wholesalers and wholesale drug divisions of McKesson in spite of the competitive advantage enjoyed by the manufacturing division of McKesson by reason of the flat 20% discount allowed to its direct buying retailers on orders of this size. The defendant's fair trade price agreements with independent wholesalers not only serve to protect McKesson's own wholesale drug divisions from being undercut in price by independent wholesalers, but also serve to protect the manufacturing division on its sales direct to retailers (Dewell, pp. 117, 118). The independent wholesaler, by virtue of his fair trade agreement with McKesson, has been required to sell McKesson products to retailers at discounts of not more than 10% and 5% from list while McKesson's manufacturing division has been selling its selected group of chain store retailers at a flat 20% from list on orders of \$1,000 or over.

10. The manufacturing division of McKesson, by virtue of its sales of McKesson products direct to retailers, is in competition with McKesson's own wholesale drug divisions (Nolen, pp. 44, 45) and with the independent wholesalers who handle McKesson products (Nolen, p. 44). It is customary for direct retail accounts of the manufacturing division to buy some
 392 McKesson products from local wholesalers as well as from the manufacturing division (Nolen, pp. 42, 43). Local stores of a chain of drug stores, as a matter of custom in the industry, have some local purchasing authority to buy drug products from local wholesalers (Nolen, p. 43). McKesson's own wholesale drug division salesmen call on some direct retail accounts of the manufacturing division (Nolen, pp. 37, 38, 40), and sell some McKesson products to these accounts (Nolen, pp. 39, 40). Some of the direct retail accounts of the manufacturing division do not purchase the complete line of McKesson products from the manufacturing division and buy additional McKesson products from local wholesalers. (Nolen, p. 39, G. 12.) Substantially all of the large chain drug stores that are direct ac-

counts of the manufacturing division purchase some McKesson products from wholesale drug divisions of McKesson and local independent wholesalers, although these purchases in some cases are limited to "shorts" and "emergency" items (G. 20 to G. 30, inclusive).

11. The large chain drug store retail accounts of the manufacturing division have local stores (and in some instances their headquarters) in the trading areas of the independent wholesalers who handle McKesson products (G. 20 to G. 30, inclusive).

12. The five independent wholesalers who purchase McKesson products from the manufacturing division, as to whom the Record does not show competition with any McKesson wholesale drug division, are as follows:

- (1) District Wholesale Drug Co., Washington, D. C.
- (2) H. B. Gilpin Co., with branches at Washington, D. C., Baltimore, Maryland, and Norfolk, Virginia.
- (3) M. Brenner and Son, Harrisburg, Pennsylvania.
- (4) Krull Wholesale Drug Co., Philadelphia, Pennsylvania.
- (5) Shoemaker and Busch, Philadelphia, Pennsylvania.

The manufacturing division of McKesson competes with each of these wholesalers by selling direct to chain drug stores located in their trading areas (G. 12, 13, 22, 26). For example, the manufacturing division sells some McKesson products direct to Peoples

Drug Stores, whose home office is in Washington, with local stores at various locations in the trading area of H. B. Gilpin Co. (G. 12, 13). As another example, the manufacturing division solicits orders for and sells McKesson products direct to, Sun Ray Drug Co. of Philadelphia Dewell, p. 56, G. 26), where two independent wholesalers of McKesson products are located, namely, Krull Wholesale Drug Co. and Shoemaker and Busch.

Dated June 14, 1955.

ALLEN A. DOBEY,
E. WINSLOW TURNER,
JOHN F. HUGHES,
Trial Attorneys.

WORTH ROWLEY,
Special Assistant to the Attorney General.

Special Assistant to the Attorney General.

394-A

Memo. of denial of motion

June 22, 1955

This application is denied June 22, 1955.

JOHN W. LEAVEY.

395 In the United States District Court for the Southern
District of New York

*Affidavit of Denis B. Sullivan in Opposition to motion for making
additional findings*

Filed June 22, 1955

[File endorsement omitted.]

[Title omitted.]

STATE OF NEW YORK,

County of New York, ss:

Denis B. Sullivan, being duly sworn, deposes and says:

1. I am a member of the law firm of Hodges, Reavis, McGrath, Pantaleoni & Downey, attorneys for the defendant. I am familiar with all the proceedings heretofore had herein. I submit this affidavit in opposition to the plaintiff's motion requesting this Court to make additional findings of fact.

2. The proposed additional findings are unnecessary in that the findings already made by this Court are complete and need no supplementation or amplification. Furthermore, it appears on the face of the proposed additional findings that they are improper in form and substance.

3. The rule applicable to findings generally is as stated by the Court of Appeals for this Circuit in *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F. 2d 992, 996 (1942):

396 "Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law."

Here the findings already made by this Court comply with that rule. It has been found that the defendant is both a manufacturer and a wholesaler, that as a manufacturer it sells its products to other wholesalers and also directly to retailers, that it fair trades its brand named products, and that in selling its brand named products it competes with wholesalers with whom it has fair trade contracts. These are the only ultimate facts needed to be found in disposing of the one issue to which the proposed additional findings are addressed, namely, whether because of the dual capacity in which McKesson operates and because of the existence of competition between it and others with whom it has fair trade contracts, such contracts are illegal price fixing agreements.

4. In this case no more elaborate findings are necessary. The action is and should remain a test case and the issue is almost entirely one of law. The action was brought to test the meaning of certain language contained in an exception to the Miller-Tydings Act which prohibits "horizontal" arrangements between manufacturers, between wholesalers, and between persons in competition with each other. The plaintiff contended that it prohibited fair trade contracts between a manufacturer like McKesson which is also a wholesaler in competition with other wholesalers whose minimum resale prices for McKesson products are fixed by the defendant. The basic facts were conceded. There were no witnesses whose credibility had to be determined. The evidence was entirely documentary.

6. Entirely apart from the above, however, it is evident from a reading of the proposed additional findings that they violate every facet of the rule enunciated in the *Petterson Lighterage & Towing Corp.* case, *supra*. Except to the extent that they restate findings already made and are therefore redundant, they are discursive, lengthy and argumentative and consist almost entirely of a recital of evidence, with frequent references to the record where such evidence purports to be found. They are nothing more than a running statement of the evidence most favorable to the Government concerning the operations of this defendant as both a manufacturer and a wholesaler, carefully selected and intermingled in such a way as to give a distorted picture of the activities under attack in this action. They are permeated with half truths, leading inevitable to false inferences.

7. I respectfully submit that this motion presents a classic example of why the rule requires findings to be concise, categorical, non-argumentative and devoid of evidence. By selecting some evidence only and ignoring the balance, the plaintiff is here asking this Court to write a misleading decision. Among others, the following are a few of the inaccuracies which would result:

(a). Throughout the proposed additional findings facts concerning the operations of the manufacturing division are so interlaced with facts concerning the operations of the wholesale divisions as to create the erroneous impression that both operations are conducted at the same functional level. Actually the reverse is true. The proof shows that the manufacturing business is as separate and distinct from the wholesaling business as any two businesses could be and still be conducted by one corporation. The two businesses are conducted independently of each other, at different levels in the marketing structure, in different establishments and by different staffs of employees.

(b) In various of the proposed additional findings statements are made concerning the nature and extent of the competition

which exists with the independent wholesalers. Some are false, others are only partly true. It is not the fact that there is competition between the manufacturing division and the independent wholesalers for the business of any retailers. And it is not the fact that there is any real competition in reselling McKesson products between the wholesale divisions and the other wholesalers to whom the wholesale divisions make courtesy sales of McKesson products. Also, it is only half true that competition exists between the wholesale divisions and all but five of the independent wholesalers. Most of the wholesale divisions are located in geographical areas where no such competition could exist, and in many of the other areas where there is competition it is only fringe competition in outlying portions of trading areas where some small overlapping exists.

(c) By paragraphs 4 and 5 the erroneous impression is created that the manufacturing division would not sell to all retailers who desired to buy from it directly. The proof shows that the manufacturing division would sell directly to any legitimate retailer who desired to do business directly with it, and that in orders for \$1,000 or more of McKesson products the retailers would get the 20% discount.

(d) The statement in paragraph 9 that the "defendant's fair trade price agreements with independent wholesalers not only served to protect McKesson's own wholesale drug divisions from being undercut in price by independent wholesalers, but also served to protect the manufacturing division on its sales direct to retailers" is purely argumentative. It is an argument with which we disagree.

8. To go on and detail each and every other respect wherein the proposed additional findings are improper would only prolong this affidavit needlessly. We are satisfied with the findings already made. Under the circumstances of this case we believe it would be improper to adopt any of the additional findings proposed by the plaintiff. We respectfully urge this Court, therefore to deny this motion in its entirety.

DENIS B. SULLIVAN.

Sworn to before me this 21st day of June 1955.

[SEAL]

Betty Stauss,
BETTY STAUSS,

Notary Public, State of New York.

No. 24-3817400, Qual. in Kings County. Commission expires
March 30, 1957.

399-A United States District Court, Southern District of New York

[Title omitted.]

Stenographer's minutes of hearing on motion to make additional findings

June 22, 1955

Before Hon. JOHN W. CLANCY, District Judge

NEW YORK, JUNE 22, 1955, 10:30 o'clock a. m.

APPEARANCES

J. Edward Lombard, Esq., United States Attorney, for the Government; by Allen A. Dobe, Esq., E. Winslow Turner, Esq., and John F. Hughes, Esq., Special Assistants to the Attorney General.

Hodges, Reavis, McGrath, Pantaleoni & Downey, Esqs., Attorneys for Defendant; Denis B. Sullivan, Esq., of Counsel.

399-B Mr. DOBEY. This is a motion under Rule 52 (b) of the Rules of Civil Procedure to make additional findings of fact in the case of United States vs. McKesson & Robbins, Inc., Civil 76-50. The written motion or rather the written request for findings, additional findings, I would like to amend in two minor respects.

If you have the requests before you, on page 2, request No. 3, at the beginning of that paragraph, insert the words "Most of," so that it will read "Most of the defendant wholesale drug divisions."

The only other change, and the one other change is on page 3 in paragraph 6, fourth line. Strike the words "are by independent wholesalers."

The COURT. "Or." That is "or by independent wholesalers."

Mr. DOBEY. Yes; strike those four words.

In all other respects I have found these additional findings to be fully supported by the record. I have checked into the record very carefully as to each one and I believe the record is fully sustained by the evidence. The record reference that is contained in

the findings were inserted solely for the convenience of the Court in the event there was a dispute as to whether the record supported the findings.

399-C Now with respect to the need for additional findings; I would like to consider the findings of the Court that were entered in connection with the opinion which was filed, I believe, on June 16—

Mr. SULLIVAN. June 6th.

Mr. DOBEY. June 6th. Paragraphs 1 and 2 of the Court's findings are incorporated in the requests for additional findings, but

more information is set forth. I find nothing wrong with Paragraphs 1 and 2.

Now when you come to Paragraph 3 of the Court's findings, that finding reads "With both the wholesale competitors and the large retailers, defendant, in accord with the Fair Trade laws of the several states permitting them, enters into fair trade price-fixing agreements affecting retail sales of its own products."

The word "retail" there is an error, except as applied to the contracts with the retailers. The contracts with the wholesalers, the April 1953 contracts, are controlled only and affect only, at least directly, the wholesale prices at which the wholesalers sell
399-D to retailers, so that there is an error in Finding 3 which I do not regard as too significant for the purposes of disposing of the merits of the case, but it is a clear error in the findings.

The COURT. It is not any error at all, but go on with your argument.

Mr. DOBEY: Well, sir, I think perhaps what you have in mind is that by controlling the price of the wholesaler to retailer, that indirectly has some effect upon the retail sales price.

The COURT: Exactly.

Mr. DOBEY. Well, I thought that probably—I didn't think that was what you did have in mind when you said "affecting retail sales." When you said "affecting retail sales" I thought you were using the price controls in the same sense as affecting the retail price controls rather than the indirect effect as far as the whole fair trade price controls are concerned.

But coming to paragraph 4: "Defendant's fair trade contracts for the sale of its own products to wholesalers provide for a maximum resale discount of ten and five percent." That is correct.

The next finding is clearly erroneous. "Defendant's fair trade contracts with retailers provide for a discount of twenty
399-E percent for purchases in excess of \$1,000." That is not so. The defendant's fair trade contracts with retailers provide for a minimum retail price on the sale, of the price to the consumer. They contain nothing whatever relating to the price at which the retailer buys; the direct-buying retailer buys from the manufacturer. That price, the twenty-percent price, is not contained in any published price. We issued a subpoena which called for the copy of the price in a discount schedule in which the manufacturing division of McKesson & Robbins company sold direct in retailing on May 1952, and what we got was G. 9, which is a typed sheet which sets forth the following as the price in discounts schedule, and that of course is a published term

and of course it is not a part of any fair trade contract because it is not fair trade.

That same finding, Paragraph 4, to which I was just referring, is also contained on page 4 of the opinion. There it is stated: "The Government has submitted proof that the defendant as a producer entered into fair trade contracts with large retailers which provided for a 20 percent discount for purchases in excess of \$1,000."

399-F Of course that, too, is a clear error. We have submitted no such proof and there are no such fair trade contracts. The same error related thereto appears on page 5 of the Court's opinion: "* * * the Government insists that the proof is coherent and within the issues in that the difference in defendant's discounts to wholesaler and retailer buyers infects all the wholesalers' fair trade agreements, making them instruments for illegal restraint."

That incorporates, as part of our position, the erroneous findings that have previously been made, and our position is not that at all. Our position is that the manufacturer could not lawfully set up a wholesale fair trade price, which he did, at which the wholesalers were required to sell to retailers, and then at the same time sell—the manufacturer himself sell the manufacturer's products direct to the chain retailers at prices below the manufacturer's own fair trade prices, because by so doing the manufacturer placed his products in unfair competition with the wholesalers by giving the direct retailers a price below the fair trade price, a secret price concession, but when the products came in unfair competition with the defendant, why they all don't meet

399-G first provision of the Miller-Tydings Act and the McGuire Act, which extends immunity only to retail price contracts for products sold in free and open competition. Many states, including New York State, use the term "fair and open competition" but the terms are synonymous. Here the products were sold in unfair competition.

Then, finally, on page 5, there is nothing in the evidence submitted by the Government which would support a finding by this court that this difference of discount by itself or in conjunction with the defendant's fair trade price structure restricts competition more than does any fair trade price system.

Well, that, of course, is not true, either, because any fair trade price system that is a fair trade price system, everybody is obligated to sell at the same minimum price. In this system, whereby the manufacturer competes with the wholesalers by selling underneath the fair trade price, you have a unique utilization of the Fair Trade laws to impose a restriction upon the wholesaler whereby he cannot even meet the price at which the same

products are being sold by someone else to retailers. I really think that the findings there are so clearly erroneous that you should give consideration to withdrawing the findings
388-H and perhaps an opinion.

The COURT. I think you have no grounds to come in here and argue this way on this notice of motion. Is there anything on your notice of motion claiming or asserting that there is error in my findings? Yes or no.

Mr. DOBEY. No; there isn't.

The COURT. Then why do you come in and argue it now? Your adversary has no chance to know what you are going to argue. I am not agreeing that there is any error. I am just calling your attention to your ground for procedure in court this morning.

I don't care what you say, I will discuss this case only from the evidence put in the record. I don't care what you say this morning or any way you want to paraphrase the evidence. You have made a motion here for additional findings.

Mr. DOBEY. Yes, sir.

The COURT. Are you deserting that motion?

Mr. DOBEY. No, sir.

The COURT. Well, argue that motion.

Mr. DOBEY. I have already argued it as far as I wish to do so.

My additional findings incorporate the clearing up of all
399-I the matters which I thought were erroneous in your findings. In other words, if you accept my additional findings, then your other findings would be inconsistent with the additional findings which I have requested because my additional findings do clear up this matter of the discount on the sales to the direct-buying retailer, and that is why—perhaps I didn't consider it fully, but I did make a motion—I haven't made a motion, as you point out, to strike the original finding.

The COURT. You cannot support your motion. You won't even argue it. Your motion is to make additional findings. Will you argue that or are you deserting it? I ask you again.

Mr. DOBEY. No, sir; I am arguing it.

The COURT. You are not arguing it at all. The only thing you are doing is trying to have me reverse myself on the ground that my findings are erroneous. You have not asked me for presentation of additional findings. You have not mentioned one of them. The only thing you said about original findings is your original assertion that they were all sustained by the proof.

Mr. DOBEY. Yes, sir.

The COURT. That is something I will disagree with, but
399-J we will pass it by. That is the only reference you have made to this motion.

Mr. DOBEY. Well, if you wish me to take them up one by one—

The COURT. I don't want you to take them up one by one. I want to know on what basis you make the motion, what you have in law to sustain your appearance before me to ask for additional findings.

Mr. DOBEY. Well, I feel that present findings are inadequate to complete the picture and that is why I move for additional findings.

The COURT. You do?

Mr. DOBEY. Yes, sir.

The COURT. Is there any rule about this that you know of? Do you know the Federal Rules?

Mr. DOBEY. Yes, sir.

The COURT. What rule are you arguing under?

Mr. DOBEY. Under Rule 52 (b).

The COURT. Well, please argue it under Rule 52-(b). Make out a case under 52 (b).

Mr. DOBEY. Well, I think, your Honor, that, taking up of Paragraph 1 of the findings, the defendant is the largest—

The COURT. I don't want you to take up any particular 399-K findings. I want you to argue the merits of your motion.

Mr. DOBEY. I don't think I can do that with—

The COURT. Strictly on the rule. I want to know where any part of it, let alone all of it, comes in under 52 (b).

Mr. DOBEY. Rule 52 (b) says—

The COURT. Don't read it to me. I have read it so often I have memorized it. Bring yourself in under it.

Mr. DOBEY. It simply provides, as I understand, you may make a motion under additional findings of fact.

The COURT. That is what it says?

Mr. DOBEY. Yes, sir.

The COURT. Well, you had better sit down there and read it again.

Mr. DOBEY. That's all I get out of it.

The COURT. Is that all of your argument?

Mr. DOBEY. Yes, sir.

The COURT. What have you to say?

Mr. SULLIVAN. Well, your Honor, your Honor has put your finger on one matter I wished to talk about. I was a bit surprised when I came in here, when I found Mr. Dobby finding errors with the findings already made. I assumed that what this motion was was that he wanted some additional or supplementary findings to the findings your Honor already made. I did not know he was challenging any of the findings.

As far as we are concerned, we believe that your findings are complete, adequate and satisfactory, that they need no supplementation or additions whatsoever. As far as I personally am concerned, I thought I knew something about the Rules, and I assumed that findings of fact were required to be non-evidentiary, were required to be nonargumentative, were required to be categorical, and were required to be confined only to the essential facts pertinent to the relevant proposition of law decided by the Court.

Now here the relevant proposition of law concerned whether or not McKesson, because of the dual capacity in which it operated, could fair trade its products under the Miller-Tydings Act, supplementing the Sherman Act.

The Government's contention in that position was that because of the dual capacity in which we operated, our fair trade was illegal price agreements.

As far as we were concerned, this was a test case. The basic facts were not disputed, and it should remain a test case, 399-M and that is what should be taken up to the Court of Appeals.

Now, your Honor, on that one basic issue, has found all relevant, essential particulars. You found that McKesson is a manufacturer. You found that McKesson is wholesaler. You found that McKesson, as a manufacturer, sells its products to both wholesalers and retailers. You have found that McKesson fair-trades its products, and you found that McKesson is in competition with other wholesalers with whom it had fair-trade contracts.

Those are all essential findings that needed to be found, and they have been found.

This is not the usual antitrust case involving volume testimony of witnesses whose credibility had to be weighed and determined. This case was submitted to your Honor on documents. The question was principally one of law. The basic facts needed to raise the issue were conceded and those same basic facts needed in order that the issue be decided have been found by your Honor, so I repeat, your Honor, as far as we are concerned, the findings made by your Honor need no elaboration whatsoever.

Now I would like to discuss for a moment, if I may, these so-called additional, proposed plans.

399-N In my humble opinion they violate every facet of the Rules with respect to findings of fact. We find them to be lengthy, we find them to be discursive; we find them to be argumentative, and we find them replete with recitals of evidence. In fact, they consist of nothing more than a running statement of the evidence most favorable to the Government, carefully

selected, and intermingled in such a way as to create an entirely distorted picture of the activities of this defendant.

We find, for instance, that the activities of the manufacturing division—facts concerning them, are so interlaced with facts concerning the activities of the wholesale division as to create the impression that both operations are conducted at the same functional level, when, as a matter of fact, the proof shows just the reverse to be the fact. The activities of the manufacturing division and the activities of the wholesale division are conducted independently and separately of each other just as independently as any two businesses could be conducted and still be conducted by one corporation. They are conducted at different levels in the marketing structure. They are conducted in independent and separate establishments. They are conducted by separate staffs of employees.

These findings, to the extent that they are true, are only half-true. They show a certain side of the picture and they have been drafted in such a way as to give the best side of the picture as far as the Government is concerned, but they don't show a true picture here at all.

Now I go on. References are made to "so-called competition with certain wholesalers. We concede we have competition with the wholesalers. There was never any dispute about it. The dispute is as to the nature and extent of that competition.

The Government findings would seem to indicate that free and substantial competition between the manufacturing division and the independent wholesalers for the business of retailers. The fact of the matter is that there is no competition between the manufacturing division and any independent wholesaler for the business of retailers. These findings would seem to indicate that there is substantial competition between the wholesale division and other outlets to whom the wholesale divisions sell McKesson products as a matter of courtesy. They may be competitive wholesalers but these are sold to these people in order for them to fill the demands for McKesson products. There is no competition with respect to McKesson products.

Also, the Government says that there is competition between the wholesale divisions in all but five of the independent wholesalers. That is only half-true. Most of the wholesale divisions are located in areas where there is and could be no competition with these independent wholesalers and in many other areas where there is competition, it is fringe competition, fringe competition which takes place only because there is a small overlapping of trading territories in certain areas. Surely there is competition in that overlapping area. But is that competition substantial? The Government hasn't shown it to be substantial.

Note

Government Exhibit 8,
facing page 199, is on Card 2.

I submit, your Honor, that on the two grounds: one, your findings, the findings already made here are adequate and sufficient and need no amplification or supplementation, and, in any event, these motions by the Government are entirely improper in form and substance and I virtually ask your Honor to deny this motion in its entirety.

Mr. DOBEY. May I say one word, your Honor?

399-Q The COURT. Yes, certainly.

Mr. DOBEY. I am not moving to strike the findings which have already been made by the Court, but I am moving, asking the Court to make these additional findings on the ground, among others, that they will clarify what I found to be false with the original findings.

The COURT. I will take that statement as truly representing the motion that you made, which I still say that you did not argue. Rule 52 (b) does not warrant any judge's making a finding after the entry of judgment, unless for the purpose of changing the original decision. Moore's book says that the rule is not as narrow as that. The only authority he gives for it is Vennell vs. United States, 2838 Fed. supp. 381. In that case, Judge Bard specifically says that the contents of the single finding he is making, in response to the motion presented to him, were already in his original findings, but that to express their squeezed contents in a few words will save the intending appellant enough money to facilitate the taking of an appeal. That is the only reason he did it. That decision did not constitute an exception to 399-R the rule at all. It is thoroughly consonant with the sense of the Rules.

I have examined, by the way, the proposed new findings. I thoroughly disagree with the plaintiff that many of them are supported by the evidence. I take exception to that statement, for example to the one that referred to the cooperation required of the purchaser. In order to find out what the witness is talking about in that case, you would have to read the next fifteen pages. He finally states what he meant at the close of about fifteen pages, and it had nothing to do with such a finding as the Government asks me to make.

My findings are completely responsive to the issues, and furthermore, they fairly represent the ultimate facts as the plaintiff itself pleaded, briefed and argued them. I regard this motion only as an attempt by the plaintiff to lay the foundation for adding some matter or form to his case on appeal. Rule 52 (b) cannot be used for that purpose. See the Universal Carloading case in 13 Federal Rules Service. That is the best citation I can give you.

The motion is denied.

403 *Government Exhibit 9—Price and Discount Schedule*

The following is Price and Discount Schedule at which McKesson and Robbins Laboratories sold McKesson products directly to retailers in effect on May 27, 1952.

The list price as set forth in price list dated Oct. 1, 1951, less the following discount:

Sales in quantities of \$1,000 and over—single shipment to one point—20% off list.

*Government Exhibit 10*404 *Wholesaler-Retailer Fair Trade Agreement in Effect*

Bridgeport
Lab. 52-15
Sheet (1)

McKesson & Robbins, Inc.
Bridgeport, Conn.

Discount: 25% from list.

Terms: 2%—20th of following month. Freight prepaid.

Sell: To Retailers:

Line Extensions of less than \$4 in original shipper indicated* 10% off list.

Single Line Extensions of \$1.00 or More 10% Discount.

\$25.00 lots assorted 10% Discount.

\$100.00 lots assorted—10 and 2½% Discount.

\$250.00 lots assorted—10 and 5% Discount.

Discounts for Prompt Payment and are Inclusive of Cash Discount.

To Wholesalers:

\$100.00 or more—16½% and prevailing discount for cash delivered.

NOTE: Insert Minimum Retail prices items (z).

HEALTH HELPS AND SPECIALTIES

	Outer Shipper Dozens	Inner Pack Dozens	Full	Ret. Min.	Dozen Whse. List
Alba-Gar, 1 pt.-----	1	-----	1.10	1.00	7.40
Alba-Gar (Phenolphthal- cin), 1 pt.-----	1	-----	1.10	1.00	7.40
Albatur, 2 oz.-----	6	1	.35	.33	2.50
Albatur, 5 oz.-----	2	-----	.65	.65	4.60
Albolene Baby Oil:					
6 oz.-----	2	-----	.40	.39	3.20
1 pt.-----	1	-----	.85	.79	6.50
Gallon-----	4 ea.	1 ea.	-----	-----	*2.00 ea.
Albolene Baby Powder, 4 oz.	4	1	.35	.35	2.40
Albolene Liquid:					
1 oz.-----	12	1	.15	.15	1.20
4 oz.-----	2	-----	.30	.30	2.25
1 pt.-----	1	-----	.75	.69	6.00
Gallon-----	4 ea.	1 ea.	3.75	3.49	*2.50 ea.
Albolene Cream:					
1½ oz. scented or plain.	1	-----	.30	.30	*2.40
4 oz. scented or plain.	1	-----	.60	.59	4.80
1 lb. scented or plain.	1	-----	1.00	.98	8.00
Albomist Nose Drops, w/Ephedrine:					
1/2 oz.-----					Temp. withdrawn
1 oz.-----					Temp. withdrawn
Alcohol Isopropyl, 1 pt.	1	-----	z	z	2.60
Alcohol Rubbing Compound:					
8 oz.-----	1	-----	.35	.29	*2.40
1 pt.-----	1	-----	.50	.49	*3.90

HEALTH HELPS AND SPECIALTIES—Continued.

	Outer Shipper Dozens	Inner Pack Dozens	Full	Ret. Min.	Dozen Whse. List
A-200 Pyrinat, Liquid 2 oz.	6	1	79	79	5.80
Ammoniated Tooth Powder, 3¼ oz.	6	1	50	43	*3.60
Analax, 6s				Temp. withdrawn	
Analax, 25s				Temp. withdrawn	

Revised to Replace
Lab. 51-51—Sheet (1)—10/1/51

March 1, 1952
Forward

405 *Government Exhibit 11—Summary of sales made by the manufacturing division of McKesson & Robbins, Incorporated, to retail accounts during the period July 1, 1951 to June 30, 1952*

[Exclusive of sales to retail accounts whose aggregate purchases were less than \$50 and of sales to the retail accounts listed in annex to item 19 of the defendant's answers to the supplemental interrogatories]

	Amount
Adams Drug Co., Pawtucket, Rhode Island	\$9,991.00
Christos 5, 10 & 25 Cent Store, Gainesville, Florida	757.00
Cohen Drug Co., Charleston, West Virginia	124,067.00
Crown Drug Co., Kansas City, Mo.	154,039.00
Cunningham Drug Co., Detroit, Michigan	363,203.00
Dow Drug Co., Cincinnati, Ohio	2,254.00
Ford Hopkins Company, Chicago, Illinois	7,525.00
Gray Drug Stores, Cleveland, Ohio	129,479.00
Harvey & Carey, Inc., Buffalo, New York	39,588.00
Jacobs Pharmacy, Atlanta, Georgia	61,800.00
Eagle Stores, Charlotte, North Carolina	108.00
Johnson Wholesale Drug Co., New Haven, Connecticut	576.00
Katz Drug Co., Kansas City, Missouri	109,782.00
King Drug Co., Cincinnati, Ohio	2,380.00
Rexall Drug Co., New York, N. Y.	21,046.00
Marshall Drug Co., Cleveland, Ohio	31,700.00
Muir Laboratories, Inc., Grand Rapids, Michigan	843.00
Peck Drug Stores, Grand Rapids, Michigan	1,637.00
Silver Rod Stores, Passaic, New Jersey	266.00
Jays Drug Co., Lockport, New York	8,083.00
Kasdin Drug Co., Miami, Florida	4,600.00
Key Drug Co., Rochester, New York	20,608.00
Standard Drug Co., Cleveland, Ohio	6,158.00
Sun Drug Co., Pittsburgh, Penna.	78,680.00
Thrifty Drug Stores, Los Angeles, California	16,217.00
Walgreen Drug Stores, Chicago, Illinois	33,787.00
United Whelan Stores, New York, N. Y.	15,744.00
F. W. Woolworth Co., New York, N. Y.	6,973.00
W. T. Grant Co., New York, N. Y.	900.00
S. S. Kresge, Detroit, Michigan	6,448.00
G. C. Murphy Co., McKeesport, Penna.	6,734.00
406 J. J. Newberry Co. New York, N. Y.	432.00
S. H. Kress & Co., New York, N. Y.	4,237.00
Nelsner Bros., Rochester, New York	245.00
McCrory Stores Corp. New York, N. Y.	5,417.00
H. L. Green Co., New York, N. Y.	2,726.00
Morris 5 & 10 Cent Stores, McKeesport, Penna.	443.00

202 UNITED STATES VS. McKESSON AND ROBBINS, INC.

	Amount
M. H. Lamston Co., New York, N. Y.	\$599.00
Fisher-Beer Co., New York, N. Y.	87.00
Abarry Steel Co., Perth Amboy, N. J.	2,615.00
Belnap & Thompson, Chicago, Illinois	149.00
Benton & Bowles, New York, N. Y.	97.00
J. L. Brandeis & Sons, Omaha, Nebraska	50.00
Cities Stores Merchandise Co., New York, N. Y.	1,114.00
Eckerd's of Erie, Inc., Erie, Penna.	343.00
Ellington & Co., New York, N. Y.	81.00
Equity Paper Co., Bridgeport, Conn.	218.00
Floyds 5 & 10, Jacksonville, Florida	249.00
H. Goldberg & Sons, Perth Amboy, N. J.	230.00
Herlin Press, Inc., New Haven, Connecticut	289.00
Jay Lighting Mfg. Co., Brooklyn, New York	1,374.00
King Drug Co., Florence, S. C.	729.00
Lowser Optical Co., Newark, N. J.	150.00
Marine Fabricators, Perth Amboy, N. J.	303.00
Plax Corporation, Hartford, Connecticut	728.00
Rapps Variety Store, Crescent City, Florida	56.00
Schtzow's 5 & 10, Belmar, New York	62.00
Special Die Set Co., Bridgeport, Conn.	138.00
State of Connecticut, Hartford, Conn.	257.00
Travellers Premium Co., New York, N. Y.	1,259.00
Veteran's Canteen Service, V. A., New York, N. Y.	293.00
Vincenti 5, 10 & 25 Cent Store, Leesburg, Florida	203.00
Walker's 5 & 10, Waynesboro, Pa.	111.00
Warner Bros. Co., Bridgeport, Conn.	110.00
Webb Hayes Agency, Los Angeles, Cal.	94.00
X-Ray Supply Co., Wheeling, W. Va.	112.00
Youngstown Novelty, Youngstown, Ohio	50.00
Bedsole Stores Co., Thomasville, Ala.	130.00
Consolidated Stores, Inc., Covington, Ga.	50.00
Cox's 5 & 10, Lancaster, S. C.	51.00
Elrods Inc., Fort Valley, Ga.	75.00
Shell Stores Co., Fair Hope, Ala.	121.00
O. M. Webb, Palatka, Florida	64.00
Wynn Stores, Cochran, Georgia	224.00

407

Government Exhibit 12

PEOPLES DRUG STORES, INC., AND SUBSIDIARY CORPORATIONS
WASHINGTON 2, D. C., March 10, 1955.

UNITED STATES DEPARTMENT OF JUSTICE,
c/o Mr. Stanley N. Barnes,
Washington 25, D. C.

RE: SNB: WR 60-21-90

* This letter from the office of F. M. Downey.

Executive offices: 61 to 77 P St. Northast, Washington, District of Columbia.

GENTLEMEN: In compliance with your request dated March 8, 1955, I am inclosing an up-to-date listing of our retail stores covering all areas in which we operate.

I am sure all of our stores carry in stock some McKesson & Robbins, Inc., merchandise since we warehouse a few of their

items, and in addition our stores would naturally stock other items for which they receive calls by ordering from their local jobbers.

If we can be of further help to you, please feel free to call on us.

Sincerely yours,

PEOPLES DRUG STORES, INC.,
F. M. Downey,
F. M. DOWNEY,
Assistant to the President.

FMD/ew.
Enclosure.

408

Government Exhibit 13

PEOPLES DRUG STORES, INC.

77 P. ST. N. E., WASHINGTON 3 D. C.

Store No.	Address	Corps
1	927-929 7th St. N. W., Wash. 1, D. C.	P. D. S.
2	505-507 7th St. N. W., Wash. 4, D. C.	P. D. S.
3	2002 14th St. N. W., Wash. 9, D. C.	P. D. S.
4	1150 7th St. N. W., Wash. 1, D. C.	P. D. S.
5	806-808 H. St. N. E., Wash. 2, D. C.	P. D. S.
6	701 15th St. N. W., Wash. 5, D. C.	P. D. S.
7	1100 G. St. N. W., Wash. 5, D. C.	P. D. S.
8	3220 14th St. N. W., Wash. 10, D. C.	P. D. S.
9	3103 M. St. N. W., Wash. 7, D. C.	P. D. S.
10	2451 18th St. N. W., Wash. 9, D. C.	P. D. S.
11	661 Penna. Ave. S. E., Wash. 3, D. C.	P. D. S.
12	741 N. Capitol St., Wash. 2, D. C.	P. D. S.
13	1000-1002 F. St. N. W., Wash. 4, D. C.	P. D. S.
14	1144-1146 Conn. Ave. N. W., Wash. 6, D. C.	P. D. S.
15	1501 H. St. N. E., Wash. 2, D. C.	P. D. S.
16	1137-1139 14th St., N. W., Wash. 5, D. C.	P. D. S.
17	3654 Ga. Ave. N. W., Wash. 10, D. C.	P. D. S.
18	2944-2946 14th St. N. W., Wash. 10, D. C.	P. D. S.
19	1901-1903 Pa. Ave. N. W., Wash. 6, D. C.	P. D. S.
20	2066 Rhode Island Ave. N. E., Wash. 18, D. C.	P. D. S.
21	18 W. Patrick St., Frederick, Md.	P. S. D. S.
22	100-102 N. Market St., Frederick, Md.	P. S. D. S.
23	725-727 King St., Alexandria, Va.	P. S. D. S.
24	4917-19 Ga. Ave. N. W., Wash. 11, D. C.	P. D. S.
25	1018 E. Capitol St., Wash. 3, D. C.	P. D. S.
26	101 S. Queen St., Martinsburg, West Va.	P. D. S.
27	1536 N. Capitol St., Wash. 1, D. C.	P. D. S.
28	924 Caroline St., Fredericksburg, 1, Va.	P. S. D. S.
29	326-328 High St., Portsmouth, Va.	P. S. D. S.
30	434 Main St., Danville, Virginia	P. S. D. S.
31	301 Granby St., Norfolk 10, Virginia	P. S. D. S.
32	213-15-17 E. City Hall Ave., Norfolk 10, Va.	P. S. D. S.
33	452-454-456 Granby St., Norfolk 10, Va.	P. S. D. S.
34	17-19 W. Wash. St., Hagerstown, Md.	P. S. D. S.
35	8315 Ga. Ave., Silver Spring, Md.	P. S. D. S.
36	5819 Patterson Ave., Richmond, Va.	P. S. D. S.
37	427 E. Broad St., Richmond, 19, Va.	P. S. D. S.
38	5550 Conn. Ave. N. W., Wash. 15, D. C.	P. D. S.
39	717 14th St. N. W., Wash. 5, D. C.	P. D. S.
40	6-7 Dupont Circle N. W., Wash. 6, D. C.	P. S. S.
41	545 W. Tuscarawas Ave., Barberton, Ohio	P. S. D. S.
42	601 W. Market St., York 4, Pennsylvania	P. S. S.
43	2824 Alabama Ave. S. E., Wash. 20, D. C.	P. D. S.
44	500 S. George St., York 1, Pa.	P. S. S.
45	1-3 E. Main St., Uniontown, Pa.	P. S. D. S.
46	Red Lion, Pennsylvania	P. S. S.
47	36 W. High St., Carlisle, Pa.	P. S. D. S.
48	5326 Baltimore Ave., Hyattsville, Md.	P. S. D. S.
49	3130 Queens Chapel Rd., Hyattsville, Md.	P. S. D. S.
50	505-507 7th St. S. W., Wash. 4, D. C.	P. D. S.
51	4821 Annapolis Rd., Bladensburg, Md.	P. S. D. S.
52	16 S. Main St., Harrisonburg, Va.	P. S. D. S.

204 UNITED STATES VS. MCKESSON AND ROBBINS, INC.

Store No.	Address	Corps
53	1400 H. St. N. W., Wash. 3, D. C.	P. D. S.
54	75 S. Main St., Chambersburg, Pa.	P. S. D. S.
55	33 W. Campbell Ave., Roanoke 11, Va.	P. S. D. S.
56	255 High St., Pottstown, Pa.	P. S. D. S.
57	71 W. Franklin St., Hagerstown, Md.	P. S. D. S.
58	7063 New Hampshire Ave., Takoma Park, Md.	P. S. D. S.
59	1 N. Loudon St., Winchester, Va.	P. S. D. S.
60	4748 Lee Highway, Arlington, Va.	P. S. D. S.
61	2-4 E. Market St., Akron 8, Ohio	P. S. D. S.
62	6901 4th St. N. W., Wash. 12, D. C.	P. D. S.
63	9716-18 Warwick Rd., Warwick, Va.	P. S. D. S.
64	638 Canton Road, Akron 12, Ohio.	P. S. D. S.
65	832 W. Market St., Akron 3, Ohio.	P. S. D. S.
66	204 E. Wash. St., New Castle, Pa.	P. S. D. S.
67	340 E. State St., Salem, Ohio.	P. S. D. S.
68	335 N. Market Ave., Canton 2, Ohio.	P. S. D. S.
69	150-152 W. Wash. St., Suffolk, Va.	P. S. D. S.
70	7820 Eastern Ave. N. W., Wash. 12, D. C.	P. D. S.
71	93 W. Exchange St., Akron 8, Ohio.	P. S. D. S.
72	128 E. Market St., Lewistown, Pa.	P. S. D. S.
73	7300 Wash.-Bald. Blvd. College Pk., Md.	P. S. D. S.
74	2529 Pa. Ave. S. E., Wash. 20, D. C.	P. D. S.
75	3000 Nichols Ave. S. E., Wash. 20, D. C.	P. D. S.
76	1348 E. Market St., Akron 6, Ohio.	P. S. D. S.
77	101 W. Market St., York 4, Pa.	P. S. S.
78	286 Pioneer St., Akron 5, Ohio.	P. S. D. S.
79	562 S. Arlington St., Akron 6, Ohio.	P. S. D. S.
80	801 N. Main St., Akron 10, Ohio.	P. S. D. S.
81	1701 Hull St., Richmond 24, Va.	P. S. D. S.
82	2097 S. Front St., Cuyahoga Falls, Ohio.	P. S. D. S.
83	323 Market St., Harrisburg, Pa.	P. S. D. S.
84	17 N. 2nd St., Harrisburg, Pa.	P. S. D. S.
85	1225 N. 3rd St., Harrisburg, Pa.	P. S. D. S.
86	2 E. Brookland Pk. Blvd., Richmond, Va.	P. S. D. S.
87	2738 W. Broad St., Richmond, Va.	P. S. D. S.
88	2 N. Wash. St., Rockville, Md.	P. S. D. S.
89	4009 S. Capitol St., Wash. 20, D. C.	P. D. S.
90	1418 11th Ave., Altoona, Pa.	P. S. D. S.
91	11 E. King St., Lancaster, Pa.	P. S. D. S.
92	1519 Quaker Lane, Fairlington, Alex. Va.	P. S. D. S.
93	3861 Alabama Ave. S. E., Wash. 20, D. C.	P. S. D.
94	578-598 Merchant St., Ambridge, Pa.	P. S. D. S.
95	Continental Square, York 1, Pa.	P. S. S.
96	1836 Wilson Blvd., Arlington, Va.	P. S. D. S.
97	3140 Wilson Blvd., Arlington, Va.	P. S. D. S.
98	3825 Mt. Vernon Ave., Alexandria, Va.	P. S. D. S.
99	704-8 Penn St., Reading, Pa.	P. S. D. S.
100	3129 Mt. Pleasant St. N. W., Wash. 10, D. C.	P. D. S.
101	1107 Pa. Ave. N. W., Wash. 4, D. C.	P. D. S.
103	6213 Ga. Ave. N. W., Wash. 11, D. C.	P. D. S.
104	74 Baltimore St., Cumberland, Md.	P. S. D. S.
105	601 S. Jefferson St., Roanoke 11, Va.	P. S. D. S.
106	643 State Street, Bristol, Va.	P. S. D. S.
107	3521 12th St. N. E., Wash. 17, D. C.	P. D. S.
108	4809 Mass. Ave. N. W., Wash. 16, D. C.	P. D. S.
109	408 Market St., Steubenville, 9, Ohio.	P. S. D. S.
110	3400 Wisconsin Ave. N. W., Wash. 16, D. C.	P. D. S.
111	100-103 E 5th. St. E. Liverpool, Ohio.	P. S. D. S.
112	216 Main St., Johnson City, Tennessee.	P. D. S.
113	120 N. Sycamore St., Petersburg, Va.	P. S. D. S.
114	3327 Conn. Ave. N. W., Wash. 8, D. C.	P. D. S.
115	204-6 W. Federal St., Youngstown 3, Ohio.	P. S. D. S.
116	1743 King St., Alexandria 2, Va.	P. S. D. S.
117	8503 Piney Branch Rd., Silver Spring, Md.	P. S. D. S.
118	228 E. Grace St., Richmond 19, Va.	P. S. D. S.
119	974 Kenmore Blvd., Akron 14, Ohio.	P. S. D. S.
120	4905 Marlboro Pike, Coral Hills, Md., P. O. Wash. 2, D. C.	P. S. D. S.
121	2934 W. Cary St., Richmond 21, Va.	P. S. D. S.
122	2616 Conn. Ave. N. W., Wash. 8, D. C.	P. D. S.
123	2807 Wash. Ave., Newport News, Va.	P. S. D. S.
124	468 E. Exchange St., Akron 4, Ohio.	P. S. D. S.
125	105 W. Beverley St., Staunton, Va.	P. S. D. S.
126	1261 Goodhope Rd. S. E., Wash. 20, D. C.	P. D. S.
127	2727 South Ave., Youngstown, Ohio.	P. S. D. S.
128	7400 Wisconsin Ave., Bethesda 14, Md.	P. S. D. S.
129	2901 Columbia Pike, Arlington, Va.	P. S. D. S.
130	3056 Minnesota Ave. N. E., Wash. 19, D. C.	P. D. S.
131	3204 Hamilton St., Hyattsville, Md.	P. S. D. S.
132	4445 Wisconsin Ave. N. W., Wash. 16, D. C.	P. D. S.
133	100 Kennedy St. N. W., Wash. 11, D. C.	P. D. S.

Store No.	Address	Corps
134	824 Main St., Lynchburg, Va.	P. S. D. S.
135	1301 Market St., Harrisburg, Pa.	P. S. D. S.
136	8627 Colesville Rd., Silver Spring, Md.	P. S. D. S.
137	1319 H. St. N. E., Wash. 2, D. C.	P. D. S.
138	944 W. Grace St., Richmond 20, Va.	P. S. D. S.
139	4819 1st St. N., Arlington, Va.	P. S. D. S.
140	7628 Granby St., Norfolk, Va.	P. S. D. S.
141	2332 Wisconsin Ave. N. W., Wash. 7, D. C.	P. D. S.
142	1302 Powhatan St., Alexandria, Va.	P. S. D. S.
143	2222 State Rd., Cuyahoga Falls, Ohio.	P. S. D. S.
144	217-219 S. Main St., Akron 8, Ohio.	P. S. D. S.
145	137 W. Broad St., Falls Church, Va.	P. S. D. S.
146	3471 N. Fairfax Drive, Arlington, Va.	P. S. D. S.
147	749 W. Princess Anne Rd., Norfolk, Va.	P. S. D. S.
148	11305 Ga. Ave., Wheaton Md.	P. S. D. S.
149	4219 Wilson Blvd., Arlington, Va.	P. S. D. S.
150	4670 Suitland Rd., Suitland, Md.	P. S. D. S.
151	56 McKinley Plaza, Niles, Ohio.	P. S. D. S.
152	1579 Plaza Blvd., Akron 20, Ohio.	P. S. D. S.
153	609 Belle View Blvd., Alexandria, Va.	P. S. D. S.
154	1580 Bells Road, Norfolk 5, Va.	P. S. D. S.
155	21 Wisconsin Circle, Chevy Chase, Md., Wash. 15, D. C.	P. S. D. S.
156	2837 State Road, Cuyahoga Falls, Ohio.	P. S. D. S.
157		
158		
159	7423 Annapolis Rd., West Lanham, Md.	P. S. D. S.
160	10141 Colesville Rd., Silver Spring, Md.	P. S. D. S.
161		
162		
163		
164		

409

Government Exhibit 14

MCKESSON & ROBBINS, INCORPORATED, LABORATORIES

BRIDGEPORT 9, CONNECTICUT, April 17, 1953.

NORTHERN DRUG CO.,

Fargo, North Dakota.

GENTLEMEN: As you know McKesson has consistently been one of the staunchest supporters of fair trade, being convinced that it is for the good not only of manufacturers, distributors and retailers in the drug trade, but equally so for the benefit of consumers.

For various reasons, including the fact that several court decisions have now been handed down upholding the Federal McGuire Act, we think it desirable at this time to put into effect new fair trade agreements covering McKesson & Robbins Laboratories products.

For this purpose there are enclosed herewith two copies of manufacturer-wholesaler fair trade contracts which we have executed.

Would you please be so kind as to execute these copies and return one of them to us.

These new contracts take the place of the former McKesson manufacturer-wholesaler fair trade agreements. As you will note the new contracts do not require you to get fair trade agreements via the legend invoice method agreement or otherwise from your

retailer customers. This is for the reason that we are getting manufacturer-retailer fair trade agreements executed by several retailers in the various fair trade states. Under the "non-signer provisions" of the Federal McGuire Act and the state fair trade acts, we will now be able to enforce fair trade prices against non-contracting as well as contracting parties, thus eliminating the necessity of us having to ask you to get retail fair trade agreements covering our products from all of your customers.

Also enclosed herewith is our latest price list showing the wholesale minimum fair trade prices on McKesson & Robbins Laboratories products. We appreciate very much the very valuable assistance and cooperation that you have given us in maintaining the fair trade prices on McKesson's items. We are convinced that they give the best value obtainable since they represent highest quality merchandise of unimpeachable integrity at fair prices to the consumer with a fair return to the wholesaler and retailer. A combination such as this cannot help but be a smashing success. We trust that you will share in the continually increasing sales which this combination will develop.

Sincerely,

MCKESSON & ROBBINS LABORATORIES,

By _____,

Vice President.

"When Health is in the Balance there can be no Compromise with Quality."

412 *Government Exhibit 15—Manufacturer-Wholesaler Fair Trade Agreement*

Between the undersigned Manufacturer, McKesson & Robbins Laboratories Division of McKesson & Robbins, Incorporated, a Maryland Corporation, and the undersigned Wholesaler.

Whereas, Manufacturer's products now or hereafter made subject to this agreement are and will be distributed under Manufacturer's trademark, brand or name in free, fair and open competition with commodities of the same general class produced by others, and Wholesaler is engaged in the sale of such products, and the parties desire to avail themselves of the fair trade acts now and hereafter in effect;

Now, therefore, in consideration of the mutual obligations here in assumed, the parties agree as follows:

1. Wholesaler will not (except as specifically permitted by statute) advertise, offer for sale or sell any products bearing or distributed under the trademark, brand or name of Manufacturer at less than Manufacturer's published minimum wholesale prices, plus in each sale the amount of all applicable sales and excise taxes.

2. Manufacturer reserves the right to change said published minimum wholesale prices and to add or eliminate products from Manufacturer's list of fair traded products upon giving reasonable notice thereof, either by publication or such other means as Manufacturer may determine.

3. Except as authorized by Manufacturer (a) the offering or giving of any thing of value by Wholesaler in connection with the sale of any of the products covered by this contract, or (b) the offering or making of any concession in connection with any such sale, or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Wholesaler of this agreement.

4. Manufacturer will employ all appropriate legal means which in the circumstances shall be reasonable, to obtain and enforce observance of the minimum wholesale selling prices established by Manufacturer pursuant to this agreement.

5. This agreement may be terminated by either party on ten (10) days' written notice to the other, but such termination shall not affect the obligations of Manufacturer or Wholesaler arising from any other agreement made by Manufacturer pursuant to an applicable fair trade act.

6. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this 415 agreement shall be lawful as applied to intrastate transactions under a statute law or public policy now or hereafter in effect in the state in which such sale is to be made or to which the products are to be transported for sale.

In witness whereof the parties hereto have executed this agreement as of this ____ day of _____ 195_____.

McKESSON & ROBBINS LABORATORY,
Division of McKesson & Robbins Incorporated,
Fairfield, Connecticut.

By , Vice President.

 Wholesaler

 Street

 City and State

By

 Title

414 *Government Exhibit 16—Manufacturer-Retailer Fair Trade Agreement*

Between the undersigned Manufacturer, McKesson & Robbins Laboratories Division of McKesson & Robbins, Incorporated, a Maryland Corporation, and the undersigned Retailer.

Whereas, Manufacturer's products now or hereafter made subject to this agreement are and will be distributed under Manufacturer's trademark, brand or name in free, fair and open competition with commodities of the same general class produced by others, and Retailer is engaged in the sale of such products, and the parties desire to avail themselves of the fair trade acts now and hereafter in effect.

Now, therefore, in consideration of the mutual obligations herein assumed, the parties agree as follows:

1. Retailer will not (except as specifically permitted by statute) advertise, offer for sale or sell any products bearing or distributed under the trademark, brand or name of Manufacturer at less than Manufacturer's published minimum retail prices, plus in each sale the amount of all applicable sales and excise taxes.

2. Manufacturer reserves the right to change said published minimum retail prices and to add or eliminate products from Manufacturer's list of fair traded products upon giving reasonable notice thereof, either by publication or such other means as Manufacturer may determine.

3. Except as authorized by Manufacturer, (a) the offering or giving of any thing of value by Retailer in connection with the sale of any of the products covered by this contract, or (b) the offering or making of any concession in connection with any such sale, or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Retailer of this agreement.

4. Manufacturer will employ all appropriate legal means which in the circumstances shall be reasonable, to obtain and enforce observance of the minimum retail selling prices established by Manufacturer pursuant to this agreement.

5. This agreement may be terminated by either party on ten (10) days' written notice to the other but such termination shall not affect the obligations of Manufacturer or Retailer arising from any other agreement made by Manufacturer pursuant to an applicable fair trade act.

6. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this agreement shall be lawful as applied to intrastate transactions under a statute, law or public policy now or hereafter in effect in the state in which such sale is to be made or to which the products are to be transported for sale.

In witness whereof the parties hereto have executed this agreement as of this _____ day of _____ 195____.

MCKESSON & ROBBINS LABORATORIES,
Division of McKesson & Robbins, Incorporated,
Fairfield, Connecticut.

By _____
Vice President.

 Retailer

 Street

 City and State
 By _____
 Title

416

Government Exhibit 17

MCKESSON & ROBBINS, INCORPORATED, LABORATORIES
 BRIDGEPORT 9, CONNECTICUT, *March 21, 1955.*

Att: General Manager.

GENTLEMEN: We are pleased to transmit to you herewith the new McKesson price list dated March 15, 1955. This brings the price list up to date and takes the place of preceding price list dated September 1, 1954.

We call your attention to the following on the new price list.

"Prices Subject to Fair Trade Acts Wherever Legally Permissible on Sales in Quantities of Less Than \$1,000."

The last line of the discount schedule reads "\$250 through \$299 assorted . . . 10% and 5% off list."

The usual quantity of these new price lists is being forwarded to you under separate cover.

We appreciate very much your cooperation in the past and look forward to working with you in the future with continually increasing sales for the mutual benefit of your firm and ours.

Very truly yours,

MCKESSON LABORATORIES,
H. V. PHILLIPS,
Vice President.

"When Health is in the Balance there can be no Compromise with Quality."

425

Government Exhibit 18

Summary of Sales of McKesson Products by Wholesale Drug Divisions of McKesson & Robbins, Incorporated, to other wholesalers during one year period commencing July 1, 1951 and ending June 30, 1952:

18 wholesale divisions made no sales.

15 wholesale divisions made sales to 38 other wholesalers but the records showing the amounts of such sales are no longer available.

41 wholesale divisions made sales aggregating \$179,342.91, including the sales of three divisions for the six month period ending on June 30, 1952. These three divisions have no records available of sales made during the previous six month period.

428

Government Exhibit 20

WALGREEN DRUG STORES

Law Department

General offices:
4300 Peterson Avenue
Chicago 30, Illinois

APRIL 18, 1955.

UNITED STATES,

Department of Justice, Washington 25, D. C.

Attention: Stanley N. Barnes, Assistant Attorney General.

Re: United States v. McKesson & Robbins, Inc.

GENTLEMEN: In reply to your letter of March 31, 1955, we have checked with our Purchasing Department to obtain the answers to the specific questions asked:

1. All of the retail stores operated by Walgreen Co., an Illinois corporation, and its subsidiaries, handle some products manufactured by McKesson & Robbins, Inc.

2. In addition to products manufactured by McKesson & Robbins, Inc., Walgreen Co. and its subsidiaries purchase some McKesson manufactured products from local independent wholesalers or wholesale drug divisions of McKesson & Robbins, Inc.

3. In the normal course of business, some items manufactured by McKesson & Robbins, Inc., are shipped direct to some retail Walgreen stores without going through a Walgreen warehouse.

We are also enclosing two copies of a mimeographed list showing the locations of stores operated by Walgreen Co. or its subsidiaries. This list has been brought up to date showing the locations of stores closed recently.

Sincerely,

WALGREEN DRUG STORES,
Thomas J. Barton.
THOMAS J. BARTON.

TJB/jd
Enc.

429

WALGREEN DRUG STORES

GENERAL OFFICE

4300 Peterson Avenue, Chicago 30, Illinois

Chicago Warehouse, 4720 S. St. Louis, Chicago 32, Illinois.
Chicago Commissary, 4425 W. Addison, Chicago 41, Illinois.
Chicago Display, 6122 N. Clark, Chicago 26, Illinois.
Chicago Studio, 1671 N. Claremont, Chicago 47, Illinois.

NOTE.—Payment of charges for locations listed above are handled by General Office.

—LOOP DISTRICT (CHICAGO)

Office: 6 E. Randolph, Rm. 205, Chicago 1, Illinois

Stores:

Chicago, Illinois, 31 E. Adams.
Chicago, Illinois, 3959 N. Ashland.
Chicago, Illinois, 2801 Broadway.
Chicago, Illinois, 3181 Broadway.
Chicago, Illinois, Closed 10/27.
Chicago, Illinois, 1 W. Division.
Chicago, Illinois, 2156 Indiana.
Chicago, Illinois, 1 E. Jackson.
Chicago, Illinois, 201 W. Jackson.
Chicago, Illinois, 51 E. Lake.
Chicago, Illinois, 150 N. LaSalle.
Chicago, Illinois, 757 N. Michigan.
Chicago, Illinois, 1000 Rush.
Chicago, Illinois, 4000 Sheridan.
Chicago, Illinois, 4 N. State.
Chicago, Illinois, 151 N. State.
Chicago, Illinois, 1169 S. Wabash.
Chicago, Illinois, 17 E. Washington.

430

NORTH SIDE OFFICE (CHICAGO)

Office: 6122 N. Clark St., Chicago, Illinois

Stores:

Chicago, Illinois, 5600 Belmont.
Chicago, Illinois, 1069 Bryn Mawr.
Chicago, Illinois, 5300 N. Clark.
Chicago, Illinois, 7000 N. Clark.
Chicago, Illinois, 7559 N. Clark.
Chicago, Illinois, 2400 Devon.
Chicago, Illinois, 4800 Fullerton.
Chicago, Illinois, 1147 Granville.
Chicago, Illinois, 1603 Howard.

Chicago, Illinois, 1958 Irving Park.
 Chicago, Illinois, 2744 Milwaukee.
 Chicago, Illinois, 4001 Milwaukee.
 Chicago, Illinois, 4790 Milwaukee.
 Chicago, Illinois, 2759 W. North.
 Chicago, Illinois, 3959 W. North.
 Chicago, Illinois, 4760 Sheridan.
 Chicago, Illinois, 1941 N. Western.
 Chicago, Illinois, 1231 Wilson.
 Des Plaines, Illinois, 1485 Ellinwood.
 Evanston, Illinois, 1601 Orrington.
 Highland Park, Illinois, 579 Central.
 Lake Forest, Illinois, 296 E. Deerpath.
 Oak Park, Illinois, 6001 North.
 Park Ridge, Illinois, 43 S. Prospect.
 Skokie, Illinois, 7954 Lincoln.
 Waukegan, Illinois, 2 S. Genesee.
 Wilmette, Illinois, 1141 Central.
 Winnetka, Illinois, 784 Elm.
 Chicago, Illinois, 3203 N. Ashland.
 Chicago, Illinois, 4776 Lincoln.

431

WEST SIDE DISTRICT (CHICAGO)

Office: 1561½ N. Cicero, Chicago 44, Illinois

Stores:

Chicago, Illinois, 4658 S. Ashland.
 Chicago, Illinois, 5457 S. Ashland.
 Chicago, Illinois, 6257 S. Ashland.
 Chicago, Illinois, 7901 S. Ashland.
 Chicago, Illinois, 9459 S. Ashland.
 Chicago, Illinois, 1559 Chicago.
 Chicago, Illinois, 5156 Chicago.
 Chicago, Illinois, 5967 Chicago.
 Chicago, Illinois, 5531 W. Lake.
 Chicago, Illinois, 1770 W. Madison.
 Chicago, Illinois, 3179 W. Madison.
 Chicago, Illinois, 3401 W. Madison.
 Chicago, Illinois, 4800 W. Madison.
 Chicago, Illinois, 5973 W. Madison.
 Chicago, Illinois, 1224 Milwaukee.
 Chicago, Illinois, 2600 S. Pulaski.
 Chicago, Illinois, 5960 Roosevelt.
 Berwyn, Illinois, 6350 Cermak.
 Berwyn, Illinois, 6800 Cermak.
 Cicero, Illinois, 4801 Cermak.
 Cicero, Illinois, 5958 Cermak.

Downers Grove, Illinois, 5134 S. Main.
 Glen Ellyn, Illinois, 520 Crescent.
 Hinsdale, Illinois, 52 S. Washington.
 La Grange, Illinois, 25 S. La Grange Rd.
 Oak Park, Illinois, 101 N. Oak Park.
 Wheaton, Illinois, 101 W. Front.
 Chicago, Illinois, 3960 W. Madison.
 Oak Park, Illinois, 1151 W. Lake.

432

SOUTH SIDE DISTRICT (CHICAGO)

Office: 743 W. 79th Street, Chicago 20, Illinois

Stores:

Chicago, Illinois, 4301 Berkeley.
 Chicago, Illinois, 5501 S. California.
 Chicago, Illinois, 9200 Commercial.
 Chicago, Illinois, 3900 Cottage Grove.
 Chicago, Illinois, 6300 Cottage Grove.
 Chicago, Illinois, 7458 Cottage Grove.
 Chicago, Illinois, 7900 Cottage Grove.
 Chicago, Illinois, 5500 Dorchester.
 Chicago, Illinois, 7500 Exchange.
 Chicago, Illinois, 7872 Exchange.
 Chicago, Illinois, 5501 S. Halsted.
 Chicago, Illinois, 6858 S. Halsted.
 Chicago, Illinois, 4257 Indiana.
 Chicago, Illinois, 4658 Michigan.
 Chicago, Illinois, 5501 Michigan.
 Chicago, Illinois, 5757 Prairie.
 Chicago, Illinois, 4701 South Park.
 Chicago, Illinois, 5100 South Park.
 Chicago, Illinois, 6257 South Park.
 Chicago, Illinois, 6257 Stewart.
 Chicago, Illinois, 6658 Stony Island.
 Chicago, Illinois, 7859 Stony Island.
 Chicago, Illinois, 4657 Woodlawn.
 Blue Island, Illinois, 12958 S. Western.
 Chicago Heights, Illinois, 1706 N. Halsted.
 East Chicago, Indiana, 722 W. Chicago.
 Gary, Indiana, 795 Broadway.
 Hammond, Indiana, 5150 S. Hohman.
 Harvey, Illinois, 167 E. 154th.
 Chicago, Illinois, 7901 S. Halsted.
 Chicago, Illinois, 7059 Jefferey.
 Chicago, Illinois, 6259 S. Kedzie.
 Chicago, Illinois, 11100 S. Michigan.
 Chicago, Illinois, 6300 S. Western.
 Chicago, Illinois, 6257 Woodlawn.

433

SPECIAL DISTRICT, CHICAGO

Office: 743 W. 10th Street, Chicago 20, Illinois

Stores:

Chicago, Illinois, 8658 Cottage Grove.
Chicago, Illinois, 5248 Lake Park.
Elmhurst, Illinois, 133 N. York.
Evergreen Park, Illinois, 9500 S. Western.
Gary, Indiana, 601 Broadway.
Chicago, Illinois, 3405 South Park.
Park Ridge, Illinois, 800 Devon.

434

COLORADO DISTRICT

Office and Warehouse: 1219 Delaware, Denver, Colorado

Stores:

Boise, Idaho, 200 N. 8th.
Boulder, Colorado, 1346 Pearl.
Casper, Wyoming, 146 E. Second.
Cheyenne, Wyoming, 220 W. 17th.
Colorado Springs, Colorado, 12 S. Tejon.
Denver, Colorado, 601 Broadway.
Denver, Colorado, 1500 Broadway.
Denver, Colorado, 2260 E. Colfax.
Denver, Colorado, 6240 E. Colfax.
Denver, Colorado, 235 16th.
Denver, Colorado, 801 16th.
Denver, Colorado, 1st Ave. & University Blvd.
Fort Collins, Colorado, 125 S. College.
Idaho Falls, Idaho, 400 North Park.
Oakland, California, 1233 Broadway.
Ogden, Utah, 2487 Washington.
Palo Alto, California, 240 University.
Phoenix, Arizona, 2 W. Washington.
Price, Utah, 3 W. Main.
Provo, Utah, 1 E. Center.
Pueblo, Colorado, 631 N. Main.
Redwood City California, 2227 Broadway.
Sacramento, California, 3460 El Camino.
Sacramento, California, 930 "K" Street.
Salt Lake City, Utah, 201 Main.
Salt Lake City, Utah, 3 West S. Temple.
Salt Lake City, Utah, 1153 Simpson.
San Francisco, California, 981 Market.
San Francisco, California, 135 Powell.
San Francisco, California, 245 Winston Drive (Stonestown)
San Mateo, California, 270 "B" Street.

Santa Monica, California, 1402 3rd.
Tucson, Arizona, 33 E. Congress.

435

DALLAS DISTRICT

Office and Warehouse: 2700 Logan, Dallas 15, Texas

Stores:

Abilene, Texas, 318 Pine.
Albuquerque, New Mexico, 201 W. Central.
Amarillo Texas, 800 Polk.
Dallas, Texas, 1321 Commerce.
Dallas Texas, 1631 Elm.
Dallas, Texas, 225 W. Jefferson.
Dallas, Texas, 1415 Main.
Dallas, Texas, 1725 Pacific.
Dallas, Texas, 8400 Preston.
El Paso, Texas, 115 N. Mesa.
Lubbock, Texas, 1219 Broadway.
Oklahoma City, Oklahoma, 229 W. Main.
San Angelo, Texas, 128 Chadbourne.
Tulsa, Oklahoma, 30 W. Fifth.
Tulsa, Oklahoma, 325 Main.
Tulsa, Oklahoma, 1714 Utica.
Waco, Texas, 601 Austin.
Wichita Falls, Texas, 710 Indiana (Allison-Walgreen Drug Store)

436

FLORIDA DISTRICT

Office: 107 N. 11th Street, Tampa 2, Florida

Stores:

Daytona Beach, Florida, 100 S. Beach.
Jacksonville, Florida, 125 Main.
Lakeland, Florida, 201 E. Main.
Miami, Florida, 244 N. E. First.
Miami, Florida, 1 W. Flagler.
Miami, Florida, 200 E. Flagler.
Mobile, Alabama, 110 Dauphin.
Orlando, Florida, 38 S. Orange.
Panama City, Florida, 485 Harrison.
Pensacola, Florida, 101 S. Palafox.
St. Petersburg, Florida, 415 Central.
Tampa, Florida, 719 Franklin.
West Palm Beach, Florida, 225 Clematis.

HOUSTON DISTRICT

Office: 1102 Sampson, Houston, Texas

Stores:

Austin, Texas, 721 Congress.
 Beaumont, Texas, 690 Pearl.
 Corpus Christi, Texas, 524 Chaparral.
 Galveston, Texas, 2202 Post Office.
 Houston, Texas, 822 S. Main.
 Houston, Texas, 1023 S. Main.
 Houston, Texas, 3200 S. Main.
 Houston, Texas, 4302 S. Main.
 Houston, Texas, 2946 Shepherd.
 Houston, Texas, 1012 Telephone Road.
 Houston, Texas, 900 Texas.
 Houston, Texas, 1037 Westheimer.
 Lake Charles, Louisiana, 801 Ryan.
 Port Arthur, Texas, 546 Procter.
 San Antonio, Texas, 300 E. Houston.
 Pasadena, Texas, 945 Shaw Ave.

437

ILLINOIS DISTRICT

Office: Room 500, First National Bank Bldg., Peoria 2, Ill.

Stores:

Aurora, Illinois, 1 S. Broadway.
 Bloomington, Illinois, 102 W. Washington.
 Burlington, Iowa, 404 Jefferson.
 Champaign, Illinois, 301 N. Neil.
 Danville, Illinois, 56 N. Vermilion.
 Decatur, Illinois, 260 N. Water.
 Elgin, Illinois, 100 E. Chicago.
 Galesburg, Illinois, 156 E. Main.
 Joliet, Illinois, 100 N. Chicago.
 Kankakee, Illinois, 236 E. Court.
 Lafayette, Indiana, 408 Main.
 Logansport, Indiana, 400 Broadway.
 Michigan City, Indiana, 631 Franklin.
 Peoria, Illinois, 400 Main.
 Rockford, Illinois, 134 N. Main.
 South Bend, Indiana, 201 N. Michigan.
 Springfield, Illinois, 500 Monroe.
 Sterling, Illinois, 15 E. Third.

438

LOUISIANA DISTRICT

Office and warehouse: 3902 Bienville St.,
New Orleans 19, La.

Stores:

Alexandria, Louisiana, 1002 Third.
Baton Rouge, Louisiana, 200 Third.
Jackson, Mississippi, 173 E. Capital.
Memphis, Tennessee, 178 Madison.
Memphis, Tennessee, 2760 Lamar.
Memphis, Tennessee, 43 Main.
Memphis, Tennessee, 64 Main.
Memphis, Tennessee, 3503 Park.
Memphis, Tennessee, 1348 Poplar.
Memphis, Tennessee, 2465 Poplar.
Memphis, Tennessee, 3 Poplar Plaza.
Monroe, Louisiana, 147 E. DeSaird.
New Orleans, Louisiana, 900 Canal.
New Orleans, Louisiana, 1730 Canal.
New Orleans, Louisiana, 734 S. Carrollton.
New Orleans, Louisiana, 4109 S. Carrollton.
New Orleans, Louisiana, 3043 Gentilly.
New Orleans, Louisiana, 2606 Jefferson.
New Orleans, Louisiana, 134 Royal.
New Orleans, Louisiana, 4338 St. Charles.
Shreveport, Louisiana, 600 Texas.
Vicksburg, Mississippi, 1415 Washington.

439

LOUISVILLE DISTRICT

Office: 629 $\frac{1}{2}$ Fourth, Louisville, Kentucky

Stores:

Augusta, Georgia, 902 Broad.
Charleston, South Carolina, 270 King.
Columbia, South Carolina, 1522 Main.
Durham, North Carolina, 102 W. Main.
Greenville, South Carolina, 22 N. Main.
Knoxville, Tennessee, 506 S. Gay.
Lexington, Kentucky, 140 W. Main.
Louisville, Kentucky, 970 Baxter.
Louisville, Kentucky, 336 Broadway.
Louisville, Kentucky, 790 Eastern Pkwy.
Louisville, Kentucky, 526 S. Fourth.
Louisville, Kentucky, 661 S. Fourth.
Louisville, Kentucky, 401 W. Jefferson.
Louisville, Kentucky, 5300 S. Third.
Nashville, Tennessee, 226 Fifth.

Raleigh, North Carolina, 200 Fayetteville.

Savannah, Georgia, 119 Bull.

Winston-Salem, North Carolina, 201 W. Fourth.

440

MICHIGAN DISTRICT

Office: Rm. 309, Euclid Bldg., 1010 Euclid Ave.,
Cleveland, Ohio

Stores:

Altoona, Pennsylvania, 1500 11th.

Anderson, Indiana, 1040 Meridian.

Battle Creek, Michigan, 38 W. Michigan.

Benton Harbor, Michigan, 134 E. Main.

Cleveland, Ohio, Closed.

Cleveland, Ohio, 13520 Euclid.

Columbus, Ohio, 51 S. High.

Ft. Wayne, Indiana, 800 Calhoun.

Ft. Wayne, Indiana, 1000 Calhoun.

Grand Rapid, Michigan, 93 Monroe.

Huntington, West Virginia, 900 4th.

Jackson, Michigan, 102 W. Michigan.

Lansing, Michigan, 107 Washington.

Lansing, Michigan, 220 Washington.

Lima, Ohio, 150 N. Main.

Muskegan, Michigan, 335 Western.

Pontiac, Michigan, 67 N. Saginaw.

Springfield, Ohio, 101 S. Limestone.

Toledo, Ohio, 601 Adams.

Toledo, Ohio, 2156 Central.

Wheeling, West Virginia, 1146 Market.

OHIO DISTRICT

Office: 4300 Peterson Ave., Chicago, Ill.

Stores:

Akron, Ohio, 138 S. Howard.

Cincinnati, Ohio, 642 Race.

Cincinnati, Ohio, 6030 Glenway.

Columbus, Ohio, 3491 Cleveland.

Columbus, Ohio, 31 Graceland.

Flint, Michigan, 600 S. Saginaw.

Kalamazoo, Michigan, 301 S. Burdick.

Muncie, Indiana, 116 S. Walnut.

Peoria, Illinois, 217 Adams.

455

CROWN DRUG COMPANY

General Office & Warehouse:
2110 Central
Kansas City, Missouri
Telephone: Harrison 5230

Address Orders and Mail:
Crown Drug Company
P. O. Box 307
Kansas City 4, Missouri

STORE DIRECTORY—GREATER KANSAS CITY

March 30, 1955

Division I

Div. Operations Manager, C. R. Richardson, 5118 Maple, Mission, KS.—
Phone: E. 0713

2	2900 E. 15th.....	K. C. 1, Mo.....	Ch. 5620.	F. M. Cartmell.....	R. Zumw.....
4	3101 Main.....	K. C. 2, Mo.....	We. 3530.	A. P. Landaker.....	L. T. Laupeson
5	3908 Prospect.....	K. C. 4, Mo.....	Wa. 3706.	T. E. Potter.....	E. O. Smith
8	3849 Main.....	K. C. 2, Mo.....	Va. 6440.	W. H. Stevens.....	L. M. Castleberry
9	2325 Swope Pkwy.....	K. C. 4, Mo.....	Wa. 3043.	J. M. Shultz.....	E. Audas
14	1800 E. 31st.....	K. C. 3, Mo.....	Li. 8200.	D. Fenticuff.....	R. Schmitt
15	4600 St. John.....	K. C. 1, Mo.....	Be. 3787.	E. J. Bohringer.....	V. Birch
16	301 E. Armour Rd.....	N. K. C., Mo.....	No. 4076.	R. L. Shellnut.....	M. Downey
17	1726 W. 39th St.....	K. C. 2, Mo.....	Lo. 2771.	P. Coxsey.....	D. Schanker
18	1800 Central.....	K. C. 3, Ks.....	Dr. 2220.	S. W. Hawk.....	J. Ross
20	3500 Main St.....	K. C. 2, Mo.....	Lo. 4414.	H. M. Brady.....	A. L. Leakey
21	8001 Woodland.....	K. C. 5, Mo.....	Ja. 0050.	P. D. Keller.....	A. L. Burke
26	3500 Troost.....	K. C. 3, Mo.....	We. 3254.	R. O. Burris.....	No assistant
33	3100 Troost.....	K. C. 3, Mo.....	We. 2145.	C. A. Green.....	D. Skinner
37	2701 Prospect.....	K. C. 1, Mo.....	Li. 2512.	K. J. McLaughlin.....	J. Alonge
40	5800 Johnson Dr.....	Mission, Ks.....	He. 2218.	E. Biscaglia.....	E. May
41	744 Minnesota.....	K. C. 11, Ks.....	At. 6265.	F. Fornal.....	R. Breitenstein
43	4262 Oak.....	K. C. 2, Mo.....	We. 3344.	B. Melia.....	Temp. Unassigned
45	4603 Paseo.....	K. C. 4, Mo.....	Wa. 6465.	G. Siedler.....	No assistant
46	3846 Indiana.....	K. C. 3, Mo.....	Wa. 1000.	J. A. Manlove.....	W. Simpson
49	2706 W. 53rd.....	K. C. 3, Ks.....	Ta. 5944.	J. A. O'Bryant.....	E. Filsinger
50	11724 E. 23rd St.....	Indep., Mo.....	Cl. 5758.	R. H. Loesemore.....	O. Ott
52	5700 Troost.....	K. C. 4, Mo.....	Hi. 5200.	J. Thompson.....	E. Birch
56	7100 Wornall.....	K. C. 5, Mo.....	Ja. 1655.	J. A. Keller.....	L. Maret
					A. F. Tripp

Maintenance 121 E. 27th—K. C. 3, Mo.—Ha. 7391-2 (after hours & holidays We 3530).

Display—Ha. 5230.

456

STORE DIRECTORY—OUTSTATE

March 30, 1955.

Division II

Div. Operations Mgr., J. E. Greenhagen, 745 S. Market, Springfield, Mo.—
Ph 2-7386

23	747 Massachusetts.....	Lawrence, Ks.....	166.....	J. M. Abrams.....	S. Adame
27	331 Delaware.....	Leavenworth, Ks.....	237.....	H. G. Marak.....	L. P. Day
30	304 S. Main.....	Ottawa, Ks.....	282.....	J. K. Pistorius.....	T. E. Simmons
32	128 S. Santa Fe.....	Salina, Ks.....	5471.....	R. E. Hill.....	L. Barker
35	510 Main St.....	Joplin, Mo.....	Mayfair 30431	T. C. Bell.....	G. Tharp
36	1 N. Main St.....	Miami, Okla.....	Kimball 2-4406	A. A. Theede.....	P. H. Garner
38	210 E. High.....	Jeff. City, Mo.....	6-3713.....	J. S. Biven.....	C. J. Amber
44	1850 S. Glenstone.....	Springfield, Mo.....	6-3018.....	R. L. Coday.....	D. S. McClure
55	625 Commercial.....	Emporia, Kans.....	266.....	W. R. Busenbark.....	J. W. Nuhn
52	401 St. Louis.....	Springfield, Mo.....	2-1961.....	A. R. Smith.....	W. T. Helyer
84	904 E. Broadway.....	Columbia, Mo.....	9484.....	R. L. Jackson.....	D. F. Kallenbach
88	815 Kansas Ave.....	Topeka, Kans.....	2-4188.....	C. F. Obermier.....	C. Tice
92	101 E. Main St.....	Chanute, Kans.....	1.....	F. A. Johnston.....	P. L. Wells
93	920 Grant.....	Carthage, Mo.....	2271.....	L. G. Alee.....	W. L. Jackson
96	123 N. Main St.....	Hutchinson, Ks.....	Mohawk 5-6331	J. Dougherty.....	F. Moore-Temp.
96	1 N. Main St.....	Ft. Scott, Ks.....	401.....	T. T. Jancich.....	R. A. Courtney
102	300 S. Ohio.....	Sedalia, Mo.....	462.....	H. W. Cassing.....	N. W. Prenger
103	100 S. Main.....	Hannibal, Mo.....	260.....	M. Schaikoski.....	V. P. Miller
105	502 N. Broadway.....	Pittsburg, Ks.....	1313.....	J. W. Broyles.....	E. C. Crowley

441

MILWAUKEE DISTRICT

Office and warehouse: 3380 N. 35th Street,
Milwaukee 10, Wisconsin

Stores:

Appleton, Wisconsin, 228 W. College.
Appleton, Wisconsin, 731 W. Foster.
Beloit, Wisconsin, 403 E. Grand.
Green Bay, Wisconsin, 324 N. Washington.
Kenosha, Wisconsin, 5800 Sixth.
Madison, Wisconsin, 32 E. Mifflin.
Milwaukee, Wisconsin, 3501 W. Burleigh.
Milwaukee, Wisconsin, 2278 Kinnickinnic.
Milwaukee, Wisconsin, 1233 W. Lincoln.
Milwaukee, Wisconsin, 1100 W. Mitchell.
Milwaukee, Wisconsin, 3432 W. North.
Milwaukee, Wisconsin, 4801 W. North.
Milwaukee, Wisconsin, 2761 N. Teutonia.
Milwaukee, Wisconsin, 2243 N. Third.
Milwaukee, Wisconsin, 2690 N. 27th.
Milwaukee, Wisconsin, 3333 G. S. 27th.
Milwaukee, Wisconsin, 1201 W. Vliet.
Milwaukee, Wisconsin, 2638 W. Vliet.
Milwaukee, Wisconsin, 2639 W. Wells.
Milwaukee, Wisconsin, 124 W. Wisconsin.
Milwaukee, Wisconsin, 300 W. Wisconsin.
Milwaukee, Wisconsin, 540 W. Wisconsin.
Milwaukee, Wisconsin, 1600 W. Wisconsin.
Racine, Wisconsin, 403 Main.
West Allis, Wisconsin, 7149 W. Greenfield.
Milwaukee, Wisconsin, 5916 N. PortWashington Rd.

442

MINNESOTA DISTRICT

Office: 1920 Nicollet, Minneapolis, Minnesota

Stores:

Aberdeen, South Dakota, 202 Main.
Council Bluffs, Iowa, 400 W. Broadway.
Des Moines, Iowa, 324 W. 7th.
Duluth, Minnesota, 129 W. Superior.
Duluth, Minnesota, 7-9 13th Avenue E.
Eau Claire, Wisconsin, 302 S. Barstow.
Lincoln, Nebraska, 1301 "O" Street.
Minneapolis, Minnesota, 337 Hennepin.
Minneapolis, Minnesota, 533 Hennepin.
Minneapolis, Minnesota, 1 W. Lake.
Minneapolis, Minnesota, 800 E. Lake.
Minneapolis, Minnesota, 733 Marquette.

Minneapolis, Minnesota, 828 Nicollet.
 Minneapolis, Minnesota, 1 W, Washington S.
 Omaha, Nebraska, 401 S. 16th.
 Omaha, Nebraska, 4832 S. 24th.
 Richfield, Minnesota, 64 W, 66th.
 St. Paul, Minnesota, 1579 University.
 St. Paul, Minnesota, 333 Wabasha.
 St. Paul, Minnesota, 425 Wabasha.
 Sioux Falls, South Dakota, 104 S. Phillip.

NEW ENGLAND DISTRICT

Office and warehouse: 100 N. Central, Teterboro, N. J.

Stores:

Albany, New York, 2 N. Pearl.
 Geneva, New York, 60 Seneca.
 Levittown, L. I., New York, 3280 Hempstead Tpk.
 New York, New York, 2 Broadway.
 New York, New York, 225 Broadway.
 New York, New York, 1350 Broadway.
 New York, New York, 1501 Broadway.
 New York, New York, 1631 Broadway.
 New York, New York, 1796 Broadway.
 New York, New York, 2081 Broadway.
 New York, New York, 625 8th Avenue.
 New York, New York, 168 W. 42nd.
 New York, New York, 298 Madison.
 New York, New York, 30 New.
 New York, New York, 9 W. 33rd.
 Niagara Falls, New York, 45 Falls.
 Portland, Maine, 601 Congress.
 Springfield, Massachusetts, 1200 Main.
 Bridgeport, Connecticut, 1005 Main.

443 Eastern Division—100 N. Central Ave.,
 Teterboro, New Jersey

The Pentagon Bldg.-Store, Washington, D. C.

NEW YORK DISTRICT

Office and warehouse: 100 N. Central Ave., Teterboro, N. J.

Stores:

Arlington, Virginia, 685 Glebe.
 De Witt, New York, 3641 Erie Blvd. E.
 East Paterson, New Jersey, 100 Broadway.
 Hartford, Connecticut, 64 State.
 Syracuse, New York, 228 S. Salina.

Worcester, Massachusetts, 520 Main.
Yonkers, New York, 29-31 Mall Walk.

ST. LOUIS DISTRICT

Office: 634 N. Grand, St. Louis, Missouri

Stores:

Centralia, Illinois, 226 E. Broadway.
East St. Louis, Illinois, 144 Collinsville.
Fort Smith, Arkansas, 822 Garrison.
Hot Springs, Arkansas, 524 Central.
Little Rock, Arkansas, 501 Main.
Maplewood, Missouri, 7374 Manchester.
Owensboro, Kentucky, 124 Main.
Paducah, Kentucky, 432 Broadway.
Quincy, Illinois, 601 Main.
St. Louis, Missouri, 2729 Cherokee.
St. Louis, Missouri, 6116 Easton.
St. Louis, Missouri, 500 Grand.
St. Louis, Missouri, 3101 Grand.
St. Louis, Missouri, 4 Hampton Village Plaza.
St. Louis, Missouri, 1000 Olive.
St. Louis, Missouri, 811 Washington.
Topeka, Kansas, 801 Kansas.
Wichita, Kansas, 3783 E. Ross Pkwy.

444 Office and Warehouse: 63 S. W. Temple, Salt Lake City,
Utah

(No Stores.)

ATLANTA GEORGIA DISTRICT

Office and Warehouse: 597 Cooledge N. E., Atlanta, Georgia

Stores:

Atlanta, Georgia, 38 Broad.
Atlanta, Georgia, 181 Peachtree.
Columbus, Georgia, 1211 Broadway.
Greensboro, North Carolina, 218 S. Elm.
Wilmington, North Carolina, 226 N. Front.
Nashville, Tennessee, 2101 Green Hills Village.

TRI CITIES DISTRICT

Office: 246 1/2 W. Third St., Davenport, Iowa

Stores:

Clinton, Iowa, 215 Fifth.
Davenport, Iowa, 201 Second.
Davenport, Iowa, 246 Third.

458

SUN RAY DRUG CO.

MONTHLY SUMMARY JAN. TO DEC. 1954

Store Sales	Store Deposits	Store Expense	Warehouse Charges	Accounts Payable	Journal	Dist Analysis	Cash Receipts
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Period	Invoice date			Due date			Receiving date			Vendor No.	Invoice No.	Store No.	Dept.	Acct. No.	Amount	Total amount
	Mo.	Day	Yr.	Mo.	Day	Yr.	Mo.	Day	Yr.				Bank			
										3498		91			588.06	*
										3498		92			976.33	*
										3498		93			231.24	*
										3498		94			674.27	*
										3498		95			417.93	*
										3498		98			2,072.69	*
										3498		99			13.63	*
										3494		105			13.63	*
										3494		127			26.83	*
										3494		204			2.71	*
										3494		208			68CR	*
										3494		215			19.27	*
										3494		950			7,072.12	*
																12,108.03
																12,108.03

Purchase Analysis

Period	Invoice date			Due date			Receiving date			Vendor No.	Invoice No.	Store No.	Dept.	Bank	Acct. No.	Amount	Total amount
	Mo.	Day	Yr.	Mo.	Day	Yr.	Mo.	Day	Yr.								

459

NEW JERSEY:

202	532 Federal St., Camden	WO 3-9618	802
204	61 South Broad St., Pitman	Pitman -9625	
205	59 King's Highway, Haddonfield	9-2516	805
207	503 Landis Ave., Vineland	7-1260	807
208	1138 Broadway, Camden	Emerson 5-9533	
209	570 Raritan Rd., Roselle Shopping Center	Chestnut 5-9701	809
211	1400 Atlantic Ave., Atlantic City	5-3454	811
214	Princeton Shopping Center, Princeton	1-5278	
		1-9742	814
215	347 George St., New Brunswick	Kilmer 5-2176	
217	1529 Boardwalk, Atlantic City	4-0561	817
218	99 S. Broad St., Trenton	Owens 5-9058	818
221	46 Broad St., Red Bank	6-9820	
224	101 N. Broad St., Trenton	Export 2-9627	824
235	33-39 S. Main St., Pleasantville	2027	835
236	164 Smith St., Perth Amboy	Hillcrest 2-9762	836
246	117 S. Broad St., Woodbury	2-1173	846
247	39 N. Laurel St., Bridgeton	9-8048	596
521	S. W. Corner Pacific & Virginia Aves., Atlantic City	4-0029	(FTN)

DELAWARE:

435	Metropolitan Mdse. Mart, Governor Printz Blvd., Wilmington	6-2193	935
436	426 Market St., Wilmington	2-9631	
437	Loockerman & Bradford Sts., Dover	9691	937
438	701 Market St., Wilmington	2-9644	
439	Newark Shopping Center, E. Main St., Newark		939

Moline, Illinois, 1600 Fifth.

Rock Island, Illinois, 1800 Second.

Rock Island, Illinois, 1801 Third.

445

Government Exhibit 21

General Offices: 1130 Walnut, Kansas City 6, Mo.

KATZ DRUG COMPANY

World's leading superstores: Kansas City, Mo.; St. Louis, Mo.;
Wellston, Mo.; St. Joseph, Mo.; Sioux City, Iowa; Memphis,
Tenn.; Des Moines, Iowa; Oklahoma City, Okla.; Kirkwood, Mo.;
Kansas City, Kans.

APRIL 7, 1955.

Mr. STANLEY N. BARNES,

U. S. Assistant Attorney General,

U. S. Department of Justice,

Washington 25, D. C.

Re: Government's Antitrust Suit McKesson & Robbins, Inc.

DEAR MR. BARNES: In compliance with your request of March
31, attached find a list showing the store number and street ad-
dress of each of our retail stores.

All of our retail stores carry some products manufactured by
McKesson and Robbins, Inc.

In answer to your second question, all stores do from time to
time purchase products manufactured by McKesson and Robbins
from local independent wholesalers or wholesale drug divisions
of McKesson and Robbins, Inc.

We hope this gives you all of the information requested in
your letter of above date.

Sincerely yours,

KATZ DRUG COMPANY,

By John Roach,

JOHN ROACH,

Operating Manager.

JR:bw.

Att.

446. *Katz Drug Company locations and telephone numbers*

Store #1, 8th & Grand, Kansas City, Missouri	Vi 1514
Store #2, 12th & McGee, Kansas City, Missouri	Vi 8208
Store #3, 728 Minnesota, Kansas City, Kansas	Dr 6050
*Store #4, 6th & Francis, St. Joseph, Missouri	4-2773
Store #5, 10th & Main, Kansas City, Missouri	Ba 4810
*Store #6, 7th & Locust, Des Moines, Iowa	3-4203
Store #7, 12th & Baltimore, Kansas City, Missouri	Gr 1610
Store #8, 12th & Walnut, Kansas City, Missouri	Vi 7236
Store #9, 40th & Main, Kansas City, Missouri	Lo 6100
*Store #10, 4th & Pierce, Sioux City, Iowa	5-8061
*Store #11, Main & Robinson, Oklahoma City, Okla.	Fo 56436
*Store #12, 7th & Locust, St. Louis, Missouri	Ga 1-1824
*Store #13, 6101 Easton, St. Louis, Missouri	Ev 5-6900
Store #14, 15th & Cleveland, Kansas City, Missouri	Ch 7786
Store #15, 3030 Prospect, Kansas City, Missouri	Ar 3800
Store #16, Independence & Hardesty, Kansas City, Missouri	Be 1701
Store #17, Linwood & Troost, Kansas City, Missouri	Lo 1873
Store #18, 63rd & Brookside, Kansas City, Missouri	Ja 3900
*Store #19, 6150 Natural Bridge Road, St. Louis, Missouri	Ev 5-6776
Store #20, 75th & Broadway, Kansas City, Missouri	De 1000
*Store #21, 6th & Edmond, St. Joseph, Mo	4-2797
*Store #22, 8th & Washington, St. Louis, Missouri	Ce 1-5901
*Store #23, 7401 Manchester, Maplewood, Missouri	Mi 5-8119
Store #24, Independence & Prospect, Kansas City, Missouri	Be 0007
Store #25, Armour & Swift, North Kansas City, Mo	No 8041
Store #26, Gregory & Prospect, Kansas City, Missouri	De 5611
Store #27, 201 North Main, Independence, Missouri	Cl 9313
Store #28, 10th & Minnesota, Kansas City, Kansas	Fi 4711
*Store #29, 331 Southwest Commerce, Oklahoma City, Okla.	Me 41406
Store #30, 4701 Sycamore, Mission, Kansas	He 0150
*Store #31, 19th & Keo, Des Moines, Iowa	5-3141
*Store #32, 2256 Lamar Ave., Memphis, Tennessee	67-7316
	67-7317
*Store #33, 441 N. Kirkwood Road, Kirkwood, Missouri	Yo 5-3787
Warehouse, 1201 Armour Road, North Kansas City, Mo	No 3977
*St. Louis District Office, 315 N. 7th Street, St. Louis, Mo	Ce 1-1881
General Office, 1130 Walnut, Kansas City, Missouri	Vi 7236
Personnel Office, 12th & Walnut St. Bldg., Kansas City, Mo	Vi 7528
*St. Louis Personnel Office	Ce 1-8927

* Out-of-town locations.

447

Government's Exhibit 22

UNITED CIGAR-WHELAN STORES CORPORATION

215 FOURTH AVENUE, NEW YORK 3, N. Y.

Whelan Drug Stores

United Cigar Stores

New address: 82 Thirty-ninth Street, Brooklyn 32, N. Y.

APRIL 21, 1955.

The ATTORNEY GENERAL,
Department of Justice,
Washington 25, D. C.

Re: SNB:WR-60-21-90

DEAR SIR: Reference is made to our prior correspondence under the above referenced number.

I am enclosing a nationwide list of our retail stores. All of the above stores handle some products manufactured by McKesson & Robbins, Inc. Purchases of these products are made from (1) local independent wholesalers, (2) from the wholesale drug divisions of McKesson & Robbins, Inc., and (3) directly from the manufacturing division (Bridgeport) of McKesson & Robbins, Inc. With respect to the latter purchases, in the calendar year of 1954 we purchased from the Bridgeport Division merchandise totalling \$11,701.

I trust that the above information is now presently sufficient for your requirements.

Very truly yours,

Attorney.

RJR:lk
Enclosure.

448

Store list

- #D-101 D. M.—J. Anastasia (11 Stores).
Hdqtrs.: 227 River Ave., Providence, R. I.
1013 38 State St., New London, Conn.
1015 2 Colony St., Meriden, Conn.
2793 60 Broad St., Pawtucket 1, R. I.
2814 151 Greenwich Ave., Greenwich, Conn.
2833 420 Main St., Middletown, Conn.
2836 1410 Hancock St., Quincy 69, Mass.
2839 759 Main St., Hartford, Conn.
2840 1507-13 Main St., Springfield, Mass.
2841 209-11 Main St., Danbury, Conn.
3216 2 N. Division St., Peekskill, N. Y.
3374 1 S. Broadway, Tarrytown, N. Y.
#D-102 D. M.—H. J. Van Vleck (14 Stores).
Hdqtrs.: Store 2575, 442 State St., Schenectady, N. Y.
1172 17 W. Bridge St., Oswego, N. Y.
1179 62 Main St., Batavia, N. Y.
1675 298 Wall St., Kingston, N. Y.
2519 3-5 Public Sq., Watertown, N. Y.
2534 400 S. Salina St., Syracuse 2, N. Y.
2545 1 North St., Middletown, N. Y.
2561 32 E. Main St., Amsterdam, N. Y.
2574 315 State St., Schenectady 5, N. Y.
2575 442 State St., Schenectady 5, N. Y.
2576 791 Albany St., Schenectady 7, N. Y.
2578 2101 Broadway, Schenectady 6, N. Y.
2579 924 Crane St., Schenectady 3, N. Y.
2592 301 S. Warren St., Syracuse 2, N. Y.

- 3233 296 Main St., Poughkeepsie, N. Y.
 #D-103 D. M.—L. G. Selwyn (12 Stores).
 Hdqtrs.: Store 966, 2836 Broadway, New York 25, N. Y.
 681 2558 Broadway, New York 25, N. Y.
 838 3542 Broadway, New York 31, N. Y.
 966 2836 Broadway, New York 25, N. Y.
 1489 4020 Broadway, New York 32, N. Y.
 3282 250 W. 57th St., New York 19, N. Y.
 3332 532 Amsterdam Ave., New York 24, N. Y.
 3334 2315 Broadway, New York 24, N. Y.
 3380 1961 Broadway, New York 23, N. Y.
 3387 1031 Madison Ave., New York 24, N. Y.
 3402 1297 Ave. of the Americas, New York 19, N. Y.
 3408 1173 Madison Ave., New York, N. Y.
 3410 254 E. Fordham Rd., New York, N. Y.
 #D-104 D. M.—M. Friedman (13 Stores).
 Hdqtrs.: Store 860, 1570 Broadway, New York, N. Y.
 47 1280 Broadway, New York 1, N. Y.
 860 1570 Broadway, New York 19, N. Y.
 943 55 E. 42nd St., New York 17, N. Y.
 1801 1256 Ave. of the Americas, New York 20, N. Y.
 1915 759 Seventh Ave., New York 19, N. Y.
 3289 430 Ninth Ave., New York 1, N. Y.
 3328 782 Second Ave., New York 17, N. Y.
 3382 1514 Broadway, New York 19, N. Y.
 3397 660 Eighth Ave., New York 18, N. Y.
 3405 236 W. 34th St., New York 1, N. Y.
 3412 1221-23 Ave. of the Americas, New York, N. Y.
 3422 163 E. 42nd St., New York, N. Y.
 #D-105 D. M.—Ralph Dandona (13 Stores).
 Hdqtrs.: Store 844, 401 W. 23rd St., New York, N. Y.
 844 401 W. 23rd St., New York 11, N. Y.
 1024 597 Bay St., Stapleton 4, S. I.
 1800 402 Ave. of the Americas, New York, N. Y.
 1947 147-02 Jamaica Ave., Jamaica 2, N. Y.
 3226 151 Richmond Ave., Pt. Richmond, S. I.
 3396 261 Eighth Ave., New York 11, N. Y.
 3399 20 University Pl., New York 3, N. Y.
 3409 3920 Main St., Flushing, N. Y.
 3409 39-20 Main St., Flushing, N. Y.
 3413 187-12 Horace Harding Blvd., Flushing, N. Y.
 3414 427 E. 14th St., New York, N. Y.
 3415 298 First Ave., New York, N. Y.
 3416 518 E. 20th St., New York, N. Y.
 3425 71-55 Kissena Blvd., Flushing, N. Y.

- #D-106 D. M.—F. F. Artale (16 Stores).
Hdqtrs.: Store 3423, Carman Ave., Village Green,
Westbury, L. I.
- 1130 2001 Mott Ave., Far Rockaway, L. I.
 - 3281 64 S. Main St., Freeport, L. I.
 - 3299 1 W. Main St., Bay Shore, L. I.
 - 3348 1 Glen St., Glen Cove, L. I.
 - 3379 57 Main St., Hempstead, L. I.
 - 3417 258-25 Union Turnpike, Glen Oaks, Bellerose, L. I.
 - 3418 61-03 Springfield Blvd., Bayside, L. I.
 - 3419 2921 Hempstead Turnpike, Levittown, L. I.
 - 3421 Cherrywood Shopping Center, Wantagh, L. I.
 - 3423 Carman Ave., Village Green, Westbury, L. I.
 - 3424 Levittown Parkway Village Green, Hicksville, L. I.
 - 3426 28 Main St., Smithtown, L. I.
 - 3427 444 Hillside Ave., East Williston, L. I.
 - 3428 397 So. Oyster Bay Rd., Hicksville, L. I.
- #D-107 D. M.—J. V. Capuano (8 Stores).
Hdqtrs.: Store 2837, 295 Main St., Orange, N. J.
- 1025 15 Park Pl., Morristown, N. J.
 - 1037 172 Main St., Asbury Park, N. J.
 - 2790 1003 Springfield Ave., Irvington, N. J.
 - 2808 1 Waverly Pl., Madison, N. J.
 - 2825 402 George St., New Brunswick, N. J.
 - 2837 295 Main St., Orange, N. J.
 - 2838 75 So. Orange Ave., So. Orange, N. J.
- 449 #D-108 D. M.—M. Chadell (9 Stores).
Hdqtrs.: Store 2775, 173 Main St., Hackensack,
N. J.
- 1035 471 Broadway, Bayonne, N. J.
 - 2741 960 Broad St., Newark, N. J.
 - 2744 234 Washington St., Hoboken, N. J.
 - 2764 48 Washington St., Bloomfield, N. J.
 - 2775 173 Main St., Hackensack, N. J.
 - 2803 125 Broad St., Elizabeth, N. J.
 - 2824 210 Main St., Paterson, N. J.
 - 2836 3801 Bergenline Ave., Union City, N. J.
 - 2843 129 Market St., Paterson, N. J.
- #D-109 D. M.—J. H. Hullick (13 Stores).
Hdqtrs.: Store 2433, 1234 Market St., Philadelphia, Pa.
- 511 201 Washington Ave., Scanton, Pa.
 - 2340 333 Walnut St., Harrisburg, Pa.
 - 2371 535 Market St., Chester, Pa.
 - 2380 770 Cumberland St., Lebanon, Pa.
 - 2397 121 S. Broad St., Philadelphia, Pa.
 - 2401 4676 Frankford Ave., Philadelphia, Pa.

- 2402 1349 Olney Ave., Philadelphia 41, Pa.
2407 2 N. George St., York, Pa.
2410 5 W. Public Sq., Wilkes-Barre, Pa.
2427 701 Hamilton St., Allentown, Pa.
2428 823 Market St., Wilmington 10, Del.
2433 1234-38 Market St., Philadelphia, Pa.
2441 1545 Pacific Ave., Atlantic City, N. J.
- #D-110 D. M.—A. E. Serafino (14 Stores).
Hdqtrs.: Room 202, 509 14th St., N. W., Washington
4 D. C.
- 1417 1349 E St., N. W., Washington 4, D. C.
1490 101 Capitol St., Charleston, W. Va.
2363 1700 Penn. Ave. N. W., Washington 6, D. C.
2374 219 Granby St., Norfolk 10, Va.
2425 700 King St., Alexandria, Va.
2446 110 S. Wayne St., Arlington, Va.
2447 1801 G St., Washington 6, D. C.
2448 4500-02 Edmondson Ave., Baltimore, Md.
2449 1820 Earhart Rd., Essex, Baltimore 21, Md.
2452 8701 Flower Ave., Silver Spring, Md.
2454 1201 Connecticut Ave., Washington, D. C.
3547 200 Capitol St., Charleston, W. Va.
3550 266-270 High St., Morgantown, W. Va.
- #D-301 D. M.—A. H. Smith (15 Stores).
Hdqtrs.: 239-243 N. W. 28th St., Miami 37, Fla.
- 3552 176 N. E. First St., Miami 32, Fla.
3554 2342 Ponce DeLeon Blvd., Coral Gables 34, Fla.
3555 7901 N. E. Second Ave., Miami 38, Fla.
3556 6140 N. W. Seventh Ave., Miami 38, Fla.
3557 1301 Washington Ave., Miami Beach 39, Fla.
3558 3601 N. W. Seventeenth Ave., Miami 37, Fla.
3559 2185 S. W. Eighth St., Miami 35, Fla.
3571 9600 N. E. Second Ave., Miami Shores, Fla.
3572 1911 Hollywood Blvd., Hollywood, Fla.
3576 200 Lincoln Rd., Miami Beach 39, Fla.
3577 220 S. Andrews Ave., Fort Lauderdale, Fla.
3579 7100 Collins Ave., Miami Beach, Fla.
3700 600 N. E. 125th St., North Miami, Fla.
3701 2232 Collins Ave., Miami Beach, Fla.
- #D-401 D. M.—B. Weissman (24 Stores).
Hdqtrs.: Store 3080, 724 So. Broadway, Los Angeles
14, Calif. (Personnel Dept.).
- 3079 533 W. 7th St., Los Angeles 14, Calif.
3080 606 S. Main St., Los Angeles 14, Calif.
3082 462 S. Spring St., Los Angeles 13, Calif.
3085 735 W. 7th St., Los Angeles 14, Calif.

- 3087 559 S. Western Ave., Los Angeles 5, Calif.
- 3093 200 No. Brand Blvd., Glendale, Calif.
- 3094 516-518 W. Sixth St., Los Angeles 14, Calif.
- 3107 100 N. Central Ave., Glendale, Calif.
- 3110 2276 Honolulu Ave., Montrose, Calif.
- 3112 2670 E. Colorado Blvd., E. Pasadena, Calif.
- 3113 209 E. Second St., Pomona, Calif.
- 3119 724 S. Broadway, Los Angeles, Calif.
- 3120 59th St. & Vermont Ave., Los Angeles, Calif.
- 3123 6400 Pacific Blvd., Huntington Park, Calif.
- 3084 3001 Ocean Front, Ocean Park, Calif.
- 3089 470 N. Beverly Dr., Beverly Hills, Calif.
- 3091 9779 Wilshire Blvd., Beverly Hills, Calif.
- 3092 6161 W. Pico Blvd., Los Angeles 35, Calif.
- 3096 8173 San Fernando Rd., Sun Valley, Calif.
- 3098 8800 Wilshire Blvd., Beverly Hills, Calif.
- 3105 14612 Ventura Blvd., Sherman Oaks, Calif.
- 3109 17901 S. Clark Ave., Bellflower, Calif.
- 3111 1045-49 San Fernando Rd., San Fernando, Calif.
- 3122 8750 S. Sepulveda Blvd., Los Angeles, Calif.

450

Government's Exhibit 23

THE MARSHALL DRUG COMPANY

General office and warehouse, West Ninth at Lakeside Avenue,
Cleveland 13, Ohio.

APRIL 4, 1955.

UNITED STATES DEPARTMENT OF JUSTICE,
Washington 25, D. C.

Attention: Mr. Stanley N. Barnes, Assist. Attorney General.

GENTLEMEN: In reply to your letter of March 31st, enclosed is a list of The Marshall Drug Company's retail drug stores.

All of our stores handle McKesson items which we buy from McKesson & Robbins, Bridgeport, Conn.

In addition to this, we purchase some of their products from McKesson & Robbins Company, 1381 West 9th Street, Cleveland, Ohio.

Trusting that this answers your questions, I am
Sincerely yours,

THE MARSHALL DRUG COMPANY,
E. B. Swisher,
E. B. SWISHER, *Adse. Mgr.*

ES/jb.

451. *Store phone numbers and addresses*

Store 1—200 Superior Ave., MA 1-2111, CH 1-8000, Ex. 13, CH 1-9520, CH 1-9521, CH 1-9522, CH 1-9523, CH 1-9524, CH 1-9525.

Store 3—13941 Euclid Ave., LI 1-9648, LI 1-9649, LI 1-9699.

Store 5—5601 Broadway Ave., MI 1-9765, MI 1-9764, MI 1-9690.

Store 6—7825 Euclid Ave., EN 1-9270, EN 1-9271, EN 1-9274.

Store 7—5501 Woodland Ave., EN 1-9063, EN 1-9064, EN 1-9241.

Store 8—8606 Hough Ave., GA 1-9528, GA 1-9583, GA 1-9577.

Store 10—14802 Detroit Ave., BO 2-9777, BO 2-9778.

Store 13—9807 Lorain Ave., ME 1-9801, ME 1-9802, ME 1-9803.

Store 15—11701 Lorain Ave., CL 1-9892, CL 1-9803, CL 1-9789.

Store 16—3838 West 25th St., FL 1-9766, ON 1-9599.

Store 17—13189 Cedar Rd., FA 1-9725, FA 1-9650.

Store 18—4180 Pearl Rd., SH 1-9800, SH 1-9814, SH 1-9614.

Store 19—3605 Lorain Ave., ME 1-9734, ME 1-9733, ME 1-9732, ME 1-9731.

Store 20—8500 Broadway Ave., MI 1-9776, MI 1-9777, MI 1-9778.

Store 22—6502 Detroit Ave., ME 1-9603, ME 1-9604, ME 1-9601.

Store 23—9300 Kinsman Ave., DI 1-9794, DI 1-9793.

Store 24—3499 East 93d St., DI 1-9740, DI 1-9737.

Store 26—14001 Kinsman Rd., LO 1-9890, LO 1-9735.

Store 28—1301 Addison Rd., EN 1-9087, EN 1-9088.

Store 30—1393 Hayden Ave., LI 1-9792, LI 1-9776.

Store 32—6500 Lorain Ave., ME 1-9675, ME 1-9676, WO 1-7118.

Store 33—905 Euclid Ave., MA 1-4360, PR 1-8565, PR 1-8668.

Store 36—17133 Lorain Ave., CL 1-9860, CL 1-9834, CL 1-9843, CL 1-9847.

Store 39—11631 Detroit Ave., BO 2-9715, BO 2-9716, BO 2-9793, BO 2-9779.

Store 41—15725 Madison Ave., BO 2-9732, BO 2-9731.

Store 43—4099 Erie St., Willoughby, Ohio, Willoughby 2-3020, 2-9830, 2-9875.

Store 44—665 Broadway, Bedford, Ohio, BE 2-9811, BE 2-9806, BE 2-9836.

Store 45—128 Main St., Painesville, Ohio, Painesville 5550, 9764.

Store 46—13228 Shaker Square, LO 1-8286, WA 1-9795.

230 UNITED STATES VS. McKESSON AND ROBBINS, INC.

Store 49—4th & Broadway, Lorain, Ohio, Lorain 3-1881, 6-2294, 6-2295, 6-2296.

Store 50—3094 West 25th St., PR 1-9531, PR 1-8834, PR 1-9160, PR 1-9564.

Store 51—382 Broad St., Elyria, Ohio, Elyria 3367.

Store 52—10646 Euclid Ave., RA 1-9132.

Store 53—11302 Euclid Ave., GA 1-9572, GA 1-9573, GA 1-9536, GA 1-9600, GA 1-9524.

Store 54—Windham, Ohio, Windham 23, 141.

Store 55—5302 Memphis Ave., SH 1-9865, SH 1-9872, SH 9-0474.

Store 57—19285 Detroit Rd., ED 1-9844, ED 1-9849, ED 1-8698.

Store 58—201 Euclid Ave., PR 1-9698, PR 1-9298, PR 1-8699, PR 1-9522, PR 1-9294, PR 1-9699.

Store 59—4541 No. Main St., Ashtabula, Ohio, Ashtabula 2-5966.

Store 60—5796 Ridge Rd., TU 5-9848, TU 5-9813.

Store 61—16660 Kinsman Rd., LO 1-9770, LO 1-9738.

Store 63—511 W. Tuscarawas, Barberton, Ohio, Sherwood 5-0417, 5-0418, 5-0419.

Store 64—4503 Mayfield Rd., EV 1-9878, EV 1-9881, EV 1-9810.

Store 65—36 W. Federal St., Youngstown, Ohio, ~~Riverside~~ 6-1822.

Store 66—4051 Lee Rd., WA 1-9667, WA 1-9831, WA 1-9655, WA 1-9684, WA 1-9701.

Store 68—5020 Turney Road, DI 1-9600, DI 1-9667, VU 3-0240.

Store 69—392 East Waterloo Rd., South Akron, Ohio, Parkway 4-0157, 4-0132, 4-0091.

Store 70—Berea Parkway Shops, Berea, Ohio, BE 4-1401, BE 4-1402, BE 4-4994.

Store 71—25991 Euclid Ave., RE 1-9795, RE 1-9774, RE 1-9780, RE 2-8060.

Store 72—3101 Westgate Rd., Fairview Park, Ohio, ED 1-9761, ED 1-9850, ED 1-9851, ED 1-9852.

Store 74—807 North Court St., Medina, Ohio, Medina 2-8861.

Store 73—Libby & Northfield Rd., Maple Heights, Ohio.

Store 75—22790 Lake Shore Blvd., Euclid, Ohio.

452

Government's Exhibit 24

SUN DRUG COMPANY, INC.

MEMBER ASSOCIATED CHAIN DRUG STORES

APRIL 4, 1955.

The ATTORNEY GENERAL,

*United States Department of Justice,
Washington 25, D. C.*

Refer to SNP: WR 60-21-90.

DEAR SIRs: As per your request in letter dated March 31, 1955 we are enclosing herewith a list of our stores and addresses.

All of these stores sell products manufactured by McKesson & Robbins, Inc. They are supplied in the most part from our central warehouse. There are times when stores may occasionally purchase certain items from the warehouse drug division of McKesson & Robbins, Inc.; this would occur when our central warehouse might be out of certain of these items.

We trust this is the information you desire.

Very truly yours,

SUN DRUG COMPANY, INC.,
W. J. Hug,
W. J. HUG, *President.*

WJH:mk.

Directors: W. J. Hug, John Gibson III, Thos. Lynch, Thomas Phillips Johnson, J. C. Sims, A. G. Wallerstedt, Richard Wright, John Gibson, Jr., D. C. Studebaker, G. W. Smith, Thomas Lynch III.

453

Sun Drug Company, Inc.

Office: 347 Bouquet Street; Warehouse: 317 Bouquet Street, Pittsburgh, Pennsylvania.

Locations

No. 1, Main & Cunningham Streets.....	Butler, Pa.
No. 2, 135 Crawford Avenue.....	Connellsville, Pa.
No. 3, Hickory Plaza Shopping Cen.....	Sharon, Pa.
No. 4, 600 Penn Avenue.....	Turtle Creek, Pa.
No. 5, Otterman at Main Street.....	Greensburg, Pa.
No. 6, 424 Fifth Avenue.....	McKeesport, Pa.
No. 7, 541 East Ohio Street.....	Pittsburgh 12, Pa.
No. 8, 3618 Forbes Street.....	Pittsburgh 13, Pa.
No. 9, 229 Brownsville Road.....	Pittsburgh 10, Pa.
No. 10, 822 Wood Street.....	Wilkinsburg, Pa.
No. 11, 1116 Seventh Avenue.....	Beaver Falls, Pa.
No. 12, Penn & Center Avenues.....	East Liberty, Pgh. 6, Pa.
No. 13, 5800 Forbes Street.....	Squirrel Hill, Pgh. 17, Pa.
No. 14, 9000 Frankstown Road.....	Pittsburgh 21, Pa.
No. 15, 743 Braddock Avenue.....	Braddock, Pa.
No. 16, 429 McKean Avenue.....	Charleroi, Pa.
No. 17, Diamond & Smithfield Sts.....	Pittsburgh, Pa.
No. 18, 722 Washington Road.....	Mt. Lebanon, Pgh. 28, Pa.

Location—Continued

No. 19, 600 N. Homewood Avenue	Homewood, Pgh. 8, Pa.
No. 20, Clark Building	Pittsburgh, Pa.
No. 21, 4142 Brownsville Road	Brentwood, Pgh. 27, Pa.
No. 22, 5th Avenue & 9th Street	New Kensington, Pa.
No. 23, 17 West Pike Street	Canonsburg, Pa.
No. 24, 37 West Main Street	Carnegie, Pa.
No. 25, 211 East 8th Avenue	Homestead, Pa.
No. 26, 218 Diamond Street	Pittsburgh, Pa.
No. 27, 625 Merchant Street	Ambridge, Pa.
No. 28, 800 Main Street	Sharpsburg, Pa.
No. 29, 119 East Ohio Street	Pittsburgh 12, Pa.
No. 30, 82 West High Street	Waynesburg, Pa.
No. 31, Broad St. & N. Highland Ave.	East Liberty, Pgh. 6, Pa.
No. 32, Depot & Ligonier Streets	Latrobe, Pa.
No. 33, 946 Liberty Avenue	Pittsburgh, Pa.
No. 34, 620 Market Street	Parkersburg, West Virginia
No. 35, Main & Center Streets	Somerset, Pa.
No. 36, 5th Ave. & Smithfield St.	Pittsburgh, Pa.
No. 37, Green's Shopping Center	Pleasant Hills, Pgh. 36, Pa.
No. 38, Miracle Mile Shopping Cen.	Monroeville, Pa.

454

*Government's Exhibit 25***CROWN DRUG COMPANY**

Executive Offices and Warehouse 2108-10-12 Central

Telephone: HARRISON 5230

KANSAS CITY 44, Mo., April 6, 1955.

UNITED STATES DEPARTMENT OF JUSTICE,

Washington 25, D. C.

Attention: Mr. Stanley N. Barnes.

Subject: SNB:WR 60-21-90

GENTLEMEN: As per your request we are attaching a list showing the number and location of each of our retail drug stores.

All of these stores stock and promote the sale of McKesson and Robbins products.

There are times when our stores pick up shorts of some merchandise from the wholesale divisions of McKesson & Robbins.

We trust this is the information you desire.

Very truly yours,

CROWN DRUG COMPANY,

C. R. Banks,

C. R. BANKS,

Executive Vice President.

CRB:hw.

Division III

Office, 47 E. 15th St., Tulsa, Oklahoma—Phone 4-5118

Div. Operations Mgr., T. G. Ingul, 9111 E. 9th St., Tulsa, Okla.—Ph. 85-7243

Div. Merchandise Mgr., J. E. Burgener, 1411 S. Quebec, Tulsa, Okla.—
Ph. 6-3261

OKLAHOMA

60	3750 E. Admiral Pl.	Tulsa	92-2011	C. Waterhouse	W. D. Mize
61	4050 Sapulpa Rd.	Tulsa	5-06111	L. W. Barker	L. S. Lewis
62	3238 E. 21st St.	Tulsa	6-7850	J. H. Anderson	C. W. Hancock-T.
63	2339 E. 15th St.	Tulsa	6-2131	F. C. Lennon	F. A. Barnett
64	4820 E. 11th St.	Tulsa	6-2141	M. I. Shadwell	C. H. Alberty
65	2261 E. 11th St.	Tulsa	6-2130	R. B. Moore	R. Pounds
66	6342 E. Admiral Pl.	Tulsa	8-0227	J. Remey	G. A. Houghton
67	204 S. Main St.	Tulsa	3-9757	F. Calton-Temp.	C. H. Wilson
68	402 S. Main St.	Tulsa	54-7278	J. P. Tracey	C. E. Hollingsworth
70	2324 E. Admiral	Tulsa	3-9542	J. W. McElhan-	H. L. Byers
				non	
72	1502 S. Peoria	Tulsa	2-2733	J. R. Bowerman	J. Peterson
73	1446 S. Boston	Tulsa	4-5106	O. Jennings	J. T. Taylor
81	301 S. Johnston	Bartlesville	2341	M. Davis	M. A. Simpson
83	301 W. 11th St.	Tulsa	4-1109	J. B. Anderson	C. M. Greenwood
94	1501 N. Cincinnati	Tulsa	54-6253	H. C. Brandes	F. S. Elder
99	121 S. Bickford	El Reno	90	G. R. Charles	W. Potts
100	402 Chickasha	Chickasha	62	F. L. Reed	L. L. Sullivan
101	200 E. Grand	Ponca City	Roger	W. H. Pittman	D. R. Anderson
			5-4505		

457

Government's Exhibit 26

SUN RAY DRUG CO.

General offices: 49th and Lancaster Avenue, Philadelphia, Pa.
150 stores throughout the East

MARCH 21, 1955.

DEPARTMENT OF JUSTICE,
Washington 25, D. C.

Att: Stanley N. Barnes, #60-21-90.

DEAR SIR: As per your request of March 8, 1955, I am enclosing a list of stores either owned or franchised by us.

In addition, you will find an analysis of purchases from McKesson & Robbins for the period from January 1, 1954 to December 31, 1954. On the analysis you will see a store #950. This is the number designated to our warehouse. It would be impossible for us to ascertain as to the stores that requested McKesson merchandise from the warehouse account.

Very truly yours,

SUN RAY DRUG CO.,
Andrew Cohn,
ANDREW COHN.AC/rs.
Encs.

236 UNITED STATES VS. McKESSON AND ROBBINS, INC.

MARYLAND:

588 301 S. Broadway, Baltimore Orleans. 2087 (FTN)

W. VIRGINIA:

502 118 N. Queen St., Martinsburg.... 5461

SUN RAY DRUG CO. OF FLORIDA:

91 925 E. 8th Ave., Hialeah, Florida. 8-81638 391

92 301 Andrews Ave., Fort Lauderdale, Florida. 6241 392

93 South Federal Highway, Dania, Florida. 4307 393

94 1928 Hollywood Blvd., Hollywood, Florida. 2-3225 394

96 199 Westgate Shopping Center, 199 W. Dixie Highway, N. Fort Lauderdale, Florida. 396

98 2401 Ponce De Leon, Coral Gables, Florida. 4-7629 398

99 7918 N. E. 2nd Ave. (Little River Store), Miami, Florida. 7-6481

PHOTO LABORATORY:

54th & Westminster Ave., Phila. (31) GR 6-0640

STONE DISPLAY MATERIALS DISPLAY DEPT.:

4889 Merion Ave., Phila. (31) TR 7-1300

After 4:30 p. m. TR 7-1302

WAREHOUSE:

4889 Merion Ave., Phila. (31) TR 7-1300

CARPENTER SHOP:

421 N. 54th St., Phila. (39) GR 4-1515

DRUG LABORATORY:

4889 Merion Ave., Phila. (31) GR 3-6661

COMMISSARY:

4801 Merion Ave., Phila. (31) TR 7-9116

GR 3-2651

WPEN:

2212 Walnut St., Phila. (3) LO 4-6000

SIGN DEPT.:

431 N. 54th St., Phila. (39) GR 6-1324

CHECK CASHING & MONEY ORDER DEPT.

(NATIONAL EXPRESS COMPANY):

1520 Market St., Phila. (2) LO 8-0144

After 6:00 p. m. EV 6-8120

SUN RAY ADDRESS LIST

460 49th & Lancaster, Phila. 31, Pa.
Greenwood 7-4100

Revised February, 1956

PHILADELPHIA:

		Ftn. No.
1	1520 Market St. (2)	592
2	932 Market St. (7)	602
3	2029 S. Broad St. (18)	603
4	5600 N. 5th St. (20)	604
6	1411 Pt. Breeze Ave. (46)	
7	5948-50 Market St. (39)	607
8	4202 Baltimore Ave. (43)	
10	4008 Lancaster Ave. (4)	610
12	3156 Kensington Ave. (34)	612
14	HeHerman & Castor Ave. (35)	
15	7618 City Line Ave. (31)	615
16	Roosevelt Blvd. & Bustlet'n Ave. (24)	616
17	6317 Woodland Ave. (42)	617

SUN RAY ADDRESS LIST—Continued

PHILADELPHIA—Continued

22	7248 Frankford Ave. (35)	MA 4-9965	
23	5230 Frankford Ave. (24)	JE 5-9729	
24	3636 Germantown Ave. (40)	SA 2-5334	
	3636 Germantown Ave. #64 Toy Basement	SA 2-5334	
		SA 2-9801*	624
26	5615 Germantown Ave. (44)	TE 9-1600	626
32	12th & Market St. (7)	WA 2-5856	632
33	2314 N. Front St. (38)	NE 4-8962	
34	N. E. Cor. 16th & Chestnut St. (3)	LO 7-3624	
		LO 7-9133*	634
38	1006 Chestnut St. (7)	WA 2-9166	638
39	4642 Frankford Ave. (24)	JE 5-9255	639
40	5212 Market St. (39)	GR 2-4932	
44	Germantown & Lehigh Ave. (33)	RA 5-3813	644
47	6166 Ridge Ave. (28)	IV 2-9848	
49	6423 Rising Sun Ave. (11)	PI 5-9853	
97	2135 W. Diamond St. (21)	FR 7-5992	
503	612 S. 60th St. (43)	GR 2-9734	
504	2932 N. 5th St. (33)	SA 2-8243	
505	419 E. Wyoming Ave. (20)	MI 4-1844	
507	812 N. 2nd St. (23)	MA 7-9919	
508	6114 Lansdowne Ave. (31)	TR 7-6369	
511	2059 E. Cheltenham Ave. (38)	NA 4-9581	
512	5520 Chester Ave. (43)	SA 7-5941	(FTN)
514	7257 Rising Sun Ave. (11)	FI 2-2393	
515	3229 N. Front St. (40)	NE 4-9438	
516	3548 N. 17th St. (40)	SA 2-9669	
517	805 E. Cheltenham Ave. (38)	VI 4-1050	
518	54th & Berks St. (31)	GR 3-9833	(FTN)
522	Presidential Apts.—Adams House, City Line Ave. & Monument Rd. (31)	GR 7-8626	
523	19th & Columbia Ave.	PO 5-9562	
525	4228 Germantown Ave. (40)	DA 4-9667	
527	13th & South St.	KI 5-6782	570
528	8th & Girard Ave. (23)	LO 3-4855	(FTN)
529	7139-41 Germantown Ave. (19)	CH 7-9946	(FTN)
530	2510 W. Lehigh Ave. (32)	SA 2-0498	
531	2901 Spring Garden St.	RI 6-3413	591
532	8 S. 52d St. (39)	GR 2-9958	
534	6808 Torresdale Ave. (35)	MA 4-9976	
535	1213 N. 52d St. (31)	TR 7-9057	
539	52d & Walnut St. (39)	GR 4-4915	(FTN)
542	2723 W. Girard Ave. (30)	PQ 5-9589	
543	4000 Chestnut St. (4)	EV 2-5075	
551	429 South St. (47)	MA 7-9519	
553	2212 Walnut St. (3)	LO 7-9225	553
554	4500 Frankford Ave. (24)	JE 5-9592	(FTN)
560	5606 N. Broad St. (41)	NA 4-1401	
565	6962 Elmwood Ave. (42)	SA 9-9003	

PENNSYLVANIA (NOT INCLUDING PHILADELPHIA):

101	Lancaster & Wayne Ave., Wayne	9672	701
105	52 E. Main St., Norristown	5-8922	595
106	West Chester Pike & Eagle Rd. Manos, Pa.	Hilltop 6-2795	706
		Hilltop 6-9650	
107	State & Olive St., Media	6-9087	597
110	339 Northampton St., Easton	2-9423	710
114	77 S. 69th St., Upper Darby	Flanders 2-6126	711

*Ranch Room.

SUN RAY ADDRESS LIST—Continued

PENNSYLVANIA, ETC.—Continued

112	213 High St., Pottstown	5967	712
114	536 Market St., Chester	3-4092	
115	758 Penn St., Reading	3-7931	
118	209 W. Main St., Lansdale	9902	
119	213-15 Wyoming Ave., Scranton	Diamond 6-0134	583
120	50 S. Main St., Wilkes-Barre	Valley 3-9381	720
121	215 Main St., Coatesville	9865	721
123	48 W. Broad St., Hazleton	2146	723
125	Bldg. #2, Levittown, Pa.	Windsor 6-8080	725
126	522 Penn St., Reading	3-6570	
127	3 N. Center St., Pottsville	1832	727
128	627 Hamilton St., Allentown	Hemlock 3-9277	
130	880 Main St., Darby	Farragut 9-9802	
131	607 Edgemont Ave., Chester	3-8812	731
134	777 Cumberland St., Lebanon	2-1641	
142	133 N. York Rd., Willow Grove	WG 9145	742
143	11th Ave. & 14th St., Altoona	3-9326	743
144	500 Main St., Johnstown	7-9135	744
150	714 Hamilton St., Allentown	Hemlock 3-9028	750
154	2 W. Lancaster Pk., Ardmore	Midway 2-7560	754
501	32 W. Main St., Waynesboro	4302	
506	708 Church Lane, Yeadow	Madison 02629	
509	33 E. Butler St., Ambler	1665	(FTN)
519	315 York Road, Jenkintown	Coontz 6147	(FTN)
526	832 Lancaster Ave., Bryn Mawr	Lawrence 5-3592	
533	West End Shopping Center, 3119 West 9th St., Chester	3-1168	
537	19 E. 3rd St., Bethlehem	University 6-9612	
538	54th & City Line, Bala-Cynwyd	OR 3-2374	
541	661 Long Lane, Stonehurst	Madison 3-9676	
546	Downingtown Farmers Market, Downingtown		
548	244 Bridge St., Phoenixville	2294	
549	17 W. Broad St., Tamaqua	9748	
555	114 Fayette St., Conshohocken	6-9233	(FTN)
558	36 S. Main St., Chambersburg	1200	
559	N. Penna. & East Maple Ave., Morrisville Shopping Center	Morrisville 9832	729
562	26 W. Independence St., Shamokin	8-8641	

461

Government's Exhibit 27

COHEN DRUG COMPANY, INCORPORATED

OFFICES AND WAREHOUSE, 801 RUFFNER AVENUE

Post Office Box 2549, Charleston 29, West Virginia

APRIL 5, 1955.

The ATTORNEY GENERAL,

United States Department of Justice, Washington 25, D. C.

DEAR SIR: Refer to your SNB: WR 60-21-90 and your letter of March 31. You will find listed below the addresses of our sixteen retail drug stores.

All of our retail stores handle products manufactured by McKesson and Robbins, Inc. As a matter of policy, our stores do not purchase McKesson manufactured products from local independent wholesalers or wholesale drug divisions of McKesson and

Robbins, Inc. There may be a few isolated incidents where stores have been out of stock on some numbers of McKesson and Robbins merchandise and ordered small quantities from wholesalers. In any event, the amount of merchandise so purchased would be negligible.

Very truly yours,

COHEN DRUG COMPANY, INC.
Saul Cohen,
SAUL COHEN.

SC: do.

160 Summers St., Charleston, W. Va.; 1599 Washington St. East, Charleston, W. Va.; 201 Stratton St., Logan, W. Va.; 4104 McCorkle Ave. S. E., Charleston, W. Va.; 222 Washington St. West, Charleston, W. Va.; Midland Trail, Belle, W. Va., 318 Twelfth St., Dunbar, W. Va.; 105 Third Ave., Williamson, W. Va.; 200 Seventh Ave., South Charleston, W. Va.; 322 Neville St., Beckley, W. Va.; 412 Federal St., Bluefield, W. Va.; Main St., Madison, W. Va.; Man, W. Va.; 1606 Second Ave., Charleston, W. Va.; Nitro, W. Va.; Gateway Shopping Center, St. Alban's, W. Va.

462

Government's Exhibit 28

GRAY DRUG STORES, INC.

APRIL 31, 1955.

UNITED STATES DEPARTMENT OF JUSTICE,
Washington 25, D. C.

Attention: The Attorney General SNB: WR 60-21-90.

GENTLEMEN: With reference to your letter of March 31, 1955, you will find enclosed a list of our various retail drug store locations.

All of our purchases of McKesson & Robbins products from the manufacturing company are ordered by our general buying office for delivery to our one warehouse. Both the buying department and warehouse are located here in Cleveland. The stores then order these products from our warehouse. Stores have the right to buy from their local wholesaler, which could include a McKesson & Robbins wholesale division. If they need merchandise not available from our central warehouse they could, of course, buy a McKesson & Robbins product in this manner. However, such purchases would be insignificant, if at all.

Yours very truly,

GRAY DRUG STORES, INC.,
C. W. EVANS,
C. W. EVANS,
Executive Vice President.

CWE: RH.
Enclosure.

240 UNITED STATES VS. McKESSON AND ROBBINS, INC.

463 Gray Drug Stores, Inc., 2400 Superior Avenue, Cleveland 14, Ohio

January 10, 1955

STORE LIST

Main office and warehouse	2400 Superior Avenue, Cleveland 14, Ohio.
	TO 1-0620
Sign-display and maintenance depts.	1534 E. 25th Street, Cleveland 14, Ohio.
	TO 1-0620
SF 1-----	1958 West 25th Street, Cleveland 13, Ohio.
	CH. 1-9697-9676-9284
SF 2-----	18235 Euclid Avenue, Cleveland 12, Ohio.
	IV. 1-9640-9652
SF 3-----	22824 Lakeshore Blvd., Euclid 23, Ohio.
	RE. 1-9757-9778-9784-9787
SF 4-----	3360 Westgate, 21000 Center Ridge Rd., Fairview Park 26, Ohio.
	ED 1-9764-9747-9735
SF 5-----	10412 Euclid Avenue, Cleveland 6, Ohio.
	CE. 1-9490-9799-9444-9441-9486
	CE. 1-9300-9302-9346-9390-9563
6-----	14202 Kinsman Road, Cleveland 20, Ohio.
	WA. 1-9770-9869
SF 7-----	13721 Lorain Avenue, Cleveland 11, Ohio.
	OR. 1-9818-9848
SF 8-----	670 East 185th Street, Cleveland 19, Ohio.
	KE. 1-9855 IV. 1-9664
SF 10-----	1770 South Parsons Avenue, Columbus 7, Ohio.
	HI 4-0225-0103
11-----	113 South Front Street, Fremont, Ohio.
	FE. 2-9265
SF 12-----	141 O'Neil Sheffield Center, Lorain, Ohio.
	3-9461-9561
SF 13-----	Columbus & Market Sts., Sandusky, Ohio.
	5959-6100-5981
SF 14-----	2467 Cleveland Avenue, Columbus 11, Ohio.
	LA. 0953-0858
SF 15-----	114 East Main Street, Columbus 15, Ohio.
	CA 4-0339-0133-0514
16-----	12305 Superior Avenue, Cleveland 6, Ohio.
	LI. 1-9755-9852
17-----	40 North Main Street, Mansfield, Ohio.
	1-1906
464 SF 18-----	1417 Hayden Avenue, E. Cleveland 12, Ohio.
	LI. 1-9536-9582
SF 19-----	2735 West Market Street, Akron, Ohio.
SF 20-----	Wilson Rd & Broad Street, Columbus, Ohio.
SF 21-----	882 Hamilton Road, Columbus, Ohio.
SF 22-----	117 South High Street, Columbus 15, Ohio.
	CA. 4-0812-0827-0109-0432-0470
SF 23-----	13801 Miles Avenue, Cleveland 5, Ohio.
	WA. 1-9668-9807
SF 24-----	81 North High Street, Columbus 15, Ohio.
	CA. 4-0169-0755-0397
SF 25-----	2379 West Broad Street, Columbus 4, Ohio.
	RA. 0140-0126
SF 26-----	14801 Detroit Avenue, Lakewood 7, Ohio.
	LA. 1-9811-9806-9816-9856
27-----	142 East Liberty Street, Wooster, Ohio.
	2-8826
28-----	1845 Beall Avenue, Wooster, Ohio.

STORE LIST—Continued

SF 29	3332 Warren Road, Cleveland 11, Ohio. OR. 1-9832-9807
33	180 Main Street, Painesville, Ohio. EL. 4-9827-9813
SF 34	5909 Broadway Avenue, Cleveland 4, Ohio. DI. 1-9596-9553-9848
SF 35	14954 St. Clair Avenue, Cleveland 10, Ohio. MU. 1-9671-9847-9726
SF 37	1187 Park Avenue West, Mansfield, Ohio.
SF 39	2699 Akron-Cleveland State Rd., Cuyahoga Falls, Ohio. WA. 8-0047-0043-0032
SF 41	127 Graceland Blvd., Columbus, Ohio. LA. 0819-0918-0947
SF 42	3409 Cleveland Avenue, Columbus, Ohio. LA. 0944-0860-0907-0985
SF 43	4788 Turney Road, Garfield Hts 23, Ohio. DI. 1-9853-9856
465 SF 44	4270 North High Street, Columbus 14, Ohio. LA. 0805-0998
SF 46	11648 Lorain Avenue, Cleveland 11, Ohio. OR. 1-9639-9757
SF 49	1489-91 Mentor Avenue, Painesville, Ohio. EL. 4-9772-9723
SF 50	1 North High Street, Columbus 15, Ohio. CA. 4-0662-0093
SF 51	296 South High Street, Columbus 15, Ohio. CA. 4-0249-0338-CA. 1-0084
53	1260 West Fifth Avenue, Columbus 12, Ohio. HU. 8-0165-0102
SF 55	21 North Nelson Road, Columbus 3, Ohio. FA. 0164-0104
56	1345 South Parsons Avenue, Columbus 6, Ohio. HE. 4-0361-0173
SF 59	524 Canton Road, Akron 12, Ohio. ST. 4-0034-0137
SF 60	102 South Main Street, Akron 8, Ohio. JE. 5-0623-0624-0585
SF 62	60 South Parsons Avenue, Columbus 15, Ohio. CA. 4-0969-CA. 1-0040
SF 63	825 West Market Street, Akron 3, Ohio. JE. 5-0613-0626
SF 64	5474 Broadway Avenue, Cleveland 4, Ohio. VU. 3-9821-9879-9899
SF 65	189 Wooster Rd. N., Barberton, Ohio. SH. 5-0486-0487-0253
SF 70	13922 Cedar Road, University Hts 18, Ohio. FA. 1-9758-9635
SF 71	15700 Broadway Avenue, Maple Hts, Ohio. MO. 2-9776-9777-9868
SF 72	3708 East Broad Street, Columbus 13, Ohio. DO. 0147-0359
SF 73	3834 East Broad Street, Columbus 13, Ohio. DO. 0253-0112-0162
SF 74	645 Harrisburg Pike, Columbus 8, Ohio. RA. 0154-0246-0257
SF 78	1700 West Market Street, Akron 13, Ohio. UN. 4-0086-0082-0085
466 SF 80	601 Euclid Ave., Cleveland 14, Ohio. PR. 1-9161-9154-9295-9437
SF 82	90 North Main Street, Mansfield, Ohio. 7063-6 7064-6

STORE LIST—Continued

Columbus Hdqtrs.	114 E. Main Street, Columbus 15, Ohio. CA. 4-6519
Akron Hdqtrs.	102 South Main Street, Akron 11, Ohio. BL. 3-9718
Gray Drug Stores, Inc., of Dayton.	2400 Superior Avenue, Cleveland.
SF 75	72-80 East Stroop Road, Dayton 9, Ohio. Walnut 0207-0202-0203
SF 76	2163 Miracle Lane, Dayton 6, Ohio. RA. 0289-0210
SF 77	4221 North Main Street, Dayton 5, Ohio. RA. 0385-0320-0119-0244
Gray Drug Stores, Inc., of Pennsylvania.	2400 Superior Avenue, Cleveland.
112	Fifth and Market Streets, Steubenville, Ohio. AT. 2-0336
SF 120	3313 Mahoning Avenue, Youngstown 9, Ohio. SW. 9-0006-0942
128	213 Market Avenue, North, Canton 3, Ohio. 4-0426-0049-0310
SF 129	2039 Mahoning Avenue N. E., Canton, Ohio.
130	229 East Tuscarawas Street, Canton 2, Ohio. 4-0616
131	771 North Garland Avenue, Youngstown, Ohio. Ri. 6-9295-9688
132	100 East Federal Street, Youngstown, Ohio. Ri. 6-9208
138	338 East Main Street, Alliance, Ohio. 1-7771-7818
140	226 Federal Avenue, Massillon, Ohio. 2-0335-0336
SF 141	24 Lincoln Way West, Massillon, Ohio. 2-0102-0179-0183
SF 145	Fourth and Market Streets, Steubenville, Ohio. 20360-20271
467 SF 165	4209 Tuscarawas St. West, Canton 8, Ohio. 7-0953-0938
SF 166	100 North Park Avenue, Warren 3, Ohio. 4-7157-7158-7106
167	2069 Elm Road, Warren, Ohio. 4-7103
SF 172	2264 Broad Street, Erie 5, Pennsylvania. 4-9689-9213
SF 176	90-92 Main Street, Bradford, Pennsylvania. 9872
SF 177	3-5 Main Street, Bradford, Pennsylvania. 9859-9800
SF 179	3010 Cromer Avenue N. W., Canton 9, Ohio. 4-0037-0036-0035
183	1807 Belmont Avenue, Youngstown 4, Ohio. Ri. 6-9371-9712
184	2640 Market Street, Youngstown 7, Ohio. ST. 8-0042-0065-0035
SF 185	285 Boardman-Canfield Rd., Youngstown 12, Ohio. SK. 8-9004-9091-9094
SF 186	466 Youngstown-Poland Rd., Struthers, Ohio. PL. 5-0967-0987
Gray Shops, Inc.	2400 Superior Avenue, Cleveland 14, Ohio.
201-3-4	Union Commerce Building, 925 Euclid Avenue, Cleveland 14, Ohio. MA 1-5420

STORE LIST—Continued

SF 248----- 1467 Chester Avenue, Cleveland 14, Ohio.
PR. 1-4166-CH. 1-9053-9118
Superior Laboratories----- 2400 Superior Avenue, Cleveland 14, Ohio.
Inc.
Superior Laboratories----- 1707 Crawford Road, Cleveland 6, Ohio.
Inc. RA. 1-1152
Photographic Department: 114 East Main Street, Columbus 15, Ohio.
CA. 1-4714

Do not address store mail to managers personally. Mail for store m' should be addressed as follows: Gray Drug Stores, Inc. #5 10412 E' Avenue, Cleveland 6, Ohio Attention: Manager.

468

Government's Exhibit 29

Detroit, Toledo, Cleveland, Pittsburgh, Cincinnati

APRIL 29, 1955.

UNITED STATES DEPARTMENT OF JUSTICE,
Washington 25, D. C.

Attention: Mr. Stanley N. Barnes, Assistant Attorney
General.

Re: Initials and Number SNB:WR-60-21-90, United States
vs. McKesson & Robbins, Inc., Civil No. 76-50

DEAR SIR: Enclosed herewith please find a copy of our retail
store list. All of our stores on this list including Shapero's and
Schettler's, handle McKesson & Robbins products.

It is our policy to purchase McKesson & Robbins products
directly from the Manufacturing Division for our warehouse and
in addition, we make purchases from wholesale drug distributors
of McKesson & Robbins for our warehouse. Our stores located
in cities other than Detroit also make purchases of McKesson &
Robbins products from the local wholesale jobbers in their
respective areas.

I trust this is the information required by you.

Very truly yours,

CUNNINGHAM DRUG STORES, INCORPORATED,
By Stewart G. Smith,
STEWART G. SMITH, Legal Department.

SGS/hh.
encl.

FEBRUARY 25, 1955.

Store Addresses and Phone Numbers

CUNNINGHAM DRUG STORES

Store	Address	City	Phone Numbers
5	3601 Woodward Avenue cor. Davenport	Detroit 26	TE 2-8363, 2-9819.
20	9101 Twelfth Street cor. Clairmount	Detroit 6	TY 4-9879, 4-8727.
22	8065 Woodward Avenue cor. Seward	Detroit 2	TR 2-9379, 2-9047.
31	15200 Livernois Avenue cor. Fenkell	Detroit 21	UN 2-9833, 1-9881.
38	6506 Chene Avenue cor. Milwaukee	Detroit 11	TR 2-9334, 2-8842.
40	5600 West Fort Street cor. Junction	Detroit 9	VI 2-9519, 2-9517.
41	7772 Harper Avenue cor. Van Dyke	Detroit 13	WA 2-9058, 4-9768.
44	9246 Mack Avenue cor. McClellan	Detroit 14	WA 2-9063, 3-9625.
45	191 Woodward Avenue	Birmingham	Midwest 4-9642.
46	22765 Woodward Avenue cor. Nine Mile	Ferndale	Lincoln 4-9806.
49	4568 Trumbull Avenue cor. Forest	Detroit 8	TE 2-8879, 2-8881.
50	5700 Woodward Avenue cor. Palmer	Detroit 2	TR 2-8810, 2-8811.
53	9100 Woodward Avenue cor. Owen	Detroit 2	TR 2-9501, 2-9813.
55	11646 Dexter Avenue cor. Webb	Detroit 6	TO 6-9601, 7-9232.
56	12050 Grand River cor. Wyoming	Detroit 4	WE 5-9511, 5-9333.
60	4346 West Fort Street cor. Clark	Detroit 9	TA 5-9786, 5-9330.
61	14277 Gratiot Avenue cor. Seven Mile	Detroit 5	LA 1-9337, 1-9685.
62	8336 West Jefferson cor. Dearborn	Detroit 17	VI 2-9732, 2-9228.
64	7300 Grand River cor. Grand Blvd.	Detroit 4	TY 4-9859, 4-9845.
65	6568 Woodward Avenue cor. Grand Blvd.	Detroit 2	TR 2-8894, 2-9574.
66	3401 Woodward Avenue cor. Peterboro	Detroit 1	TEmple 2-8958.
68	29 North Saginaw	Fruitae	FEderal 3-9537.
69	3797 Gratiot Avenue cor. Mt. Elliott	Detroit 7	WA 2-9318, 2-9657.
72	13305 Woodward Avenue cor. Waverly	Highland Park	TO 6-9871, 6-9870.
73	1065 Woodward Avenue	Detroit 26	WO 4-8878, 4-9639.
75	80 West Adams Avenue cor. Park	Detroit 26	WO 4-8712, 4-7459.
76	550 Woodward Avenue cor. Congress	Detroit 26	WO 4-7245, 4-7244.
77	9128 Grand River cor. Joy Road	Detroit 4	TY 4-9730, 4-9691.
80	1124 Griswold Street	Detroit 26	W Oodward 4-7736.
81	14201 East Jefferson cor. Newport	Detroit 15	ED 1-9517, 1-9551.
82	323 South Main Street cor. Fourth	Royal Oak	OLIncoln 1-9432.
83	5800 West Fort Street cor. Campbell	Detroit 9	VI 2-9706, 2-9286.
84	5517 Michigan Avenue cor. Junction	Detroit 10	TA 5-9671, 5-9474.
85	9666 Gratiot Avenue cor. Penna	Detroit 13	WA 2-9827, 2-8895.
87	7931 West Vernor cor. Springwells	Detroit 9	VI 2-9864, 2-9857.
88	16548 Woodward Avenue cor. Six Mile	Highland Park	TO 7-9426, 6-9738.
89	19102 Woodward Avenue cor. Seven Mile	Detroit 3	TO 6-9755, 6-9533.
90	22001 West Michigan cor. Monroe	Dearborn	LO 1-9639, 1-9843.
91	8001 Gratiot Avenue cor. Van Dyke	Detroit 13	WA 2-9692, 1-1976.
93	13821 Woodward Avenue cor. Pasadena	Highland Park	TO 6-9497, 6-9634.
94	1758 South Fort Street cor. Southfield	Lincoln Park	DU 1-9860, 1-9837.
96	11262 Mack Avenue cor. St. Jean	Detroit 14	ED 1-9782, 1-9882.
97	7100 West Warren cor. Burnette	Detroit 10	TY 4-9239, 4-9255.
98	10340 Joseph Campau cor. Caniff	Hamtramack	TR 2-9135, 1-9817.
99	14500 Grand River cor. Strathmoor	Detroit 27	VE 5-9891, 5-9802.
100	27 North Gratiot	Mt. Clemens	HOWard 8-9300.
102	221 East Genessee	Saginaw	SAGinaw 5-2041.
103	10920 Grand River cor. Oakman	Detroit 4	WE 5-9666, 5-9171.
104	12801 Woodward Avenue cor. Glendale	Highland Park	TO 7-9612, 7-9692.
105	120 Michigan Avenue	Ypsilanti	YPSilanti 9271.
106	226 South Main Street	Ann Arbor	NOrmandy 8-9549.
107	3208 Biddle Avenue	Wyandotte	Avenue 2-9450.
108	10450 East Warren cor. Outer Drive	Detroit 24	TU 5-9613, 5-9739.
109	29-33 South Monroe	Monroe	CHerry 1-9793.
110	235 Huron Street	Pt. Huron	YUkon 5-9315.
111	17800 Grand River cor. Southfield	Detroit 21	VE 5-9529, 5-9867.
112	21749 Grand River cor. Lasher	Detroit 19	KE 1-9806, 1-9840.
113	17101 Livernois Avenue cor. McNichols	Detroit 21	UN 2-9822, 2-9803.
114	820 Washington Street	Bay City	Bay City 9223.
115	13600 Fenkell Avenue cor. Schaefer	Detroit 37	VE 7-9858, 7-9819.
116	308 S. Washington	Royal Oak	Lincoln 1-4567.
117	10000 Fenkell Avenue cor. Wyoming	Detroit 31	UN 1-9657, 1-9619.
118	122 S. Washington	Lansing	LANSing 9-8336.
119	14353 Mack Avenue cor. Chalmers	Detroit 15	ED 1-9125, 1-9126.
120	1401 Washington Blvd.	Detroit 26	W Oodward 4-7385.
122	7654 Michigan Avenue cor. Central	Detroit 10	VI 2-9809, 2-9731.
123	10507 West Jefferson cor. Henry	River Rouge	VI 2-9859, 2-9757.
124	13609 Michigan Avenue cor. Schaefer	Dearborn	LU 1-9794, 1-9730.
125	7737 East Seven Mile cor. Van Dyke	Detroit 13	TW 1-9723, 1-9728.
127	14563 Woodward Avenue cor. Sears	Highland Park	TO 6-9694, 7-9342.
128	101 West Main Street	Owosso	OWosso 426, 9943.
129	6 East Main Street	Midland	TEmple 9-9273.

Store Addresses and Phone Numbers—Continued

CUNNINGHAM DRUG STORES—Continued

Store	Address	City	Phone Numbers
470	130 145, West Michigan	Jackson	Jackson 9514.
	131 15201 Houston Avenue cor. Hayes	Detroit 5	LA 1-9846, 1-9882.
132	101 West Maume	Adrian	CO 5-7522.
133	6313 West Seven Mile cor. Livernois	Detroit 21	UN 2-9552, 2-9831.
134	15500 Grand River cor. Greenfield	Detroit 21	VE 5-9574, 5-9571.
135	5602 West Wernor cor. Junction	Detroit 9	TA 5-9457, 5-9458.
136	22661 Gratiot Avenue cor. Nine Mile	East Detroit	PRescott 5-9289.
137	14201 Harper Avenue cor. New port	Detroit 13	LA 1-9453, 1-9456.
138	16941 Kercheval Avenue cor. Notre Dame	Grosse Pointe	TU 5-9698, 5-9622.
141	2867 East Seven Mile cor. Conant	Detroit 3	TWinbrook 2-9707.
142	1719 Stamford	Willow Run	YPsilanti 9352.
143	2379 Venoy Road	Wayne	Parkway 1-9347.
145	17730 Joy Road cor. Southfield	Detroit 10	VE 5-9780, 5-9703.
146	10026 West Eight Mile	Ferndale	LIncoln 1-9245.
147	9300 Joseph Campau cor. Holbrook	Hamtramck	TR 3-9734, 3-9732.
148	2137 Woodward Avenue cor. Columbia	Detroit 1	WO 4-7855, 4-1589.
149	16914 Schaefer Road cor. McNichols	Detroit 27	UN 1-9731, 4-9688.
151	13-15 West Michigan Ave.	Battle Creek	WWoodward 5-9191.
152	8949 Joy Road cor. Wyoming	Detroit 1	WE 5-9399, 5-9284.
153	35 East Grand River	Detroit 26	WO 4-9291, 4-9453.
154	6500 Allen Road cor. Southfield	Allen Park	WAlnut 8-9766.
157	3144 West Twelve Mile	Berkley	LIncoln 1-9203.
159	14400 South Fort Street cor. Phillips	Wyandotte	AVerue 2-9336.
163	20101 Plymouth Road cor. Vaughan	Detroit 28	VRemont 8-9730.
164	2580 West Grand Blvd. cor. Twelfth	Detroit 8	TRinity 2-9324.
165	20000 West Seven Mile cor. Evergreen	Detroit 19	KE 3-9783, 3-9781.
166	13100 East Jefferson cor. Lenox	Detroit 15	ED 1-9421, 1-9519.
167	101 South Mitchell	Cadillac	PRospect 5-9036.
169	35082 Michigan Avenue	Wayne	Parkway 1-9509.
170	161 East Front Street	Traverse City	TRaverse 3464.
171	23401 Greater Mack	St. Clair Shores	PRescott 5-9500.
172	918 North Woodward	Royal Oak	LIncoln 1-9767.
174	Bldg F7 James Couzens, Eight Mile Road	Detroit 35	ELgin 6-9639.
175	33251 Plymouth Road cor. Farmington	Livonia	Livonia 9163.
176	3 Telegraph Rd. S. cor. Huron St.	Pontiac	FEderal 3-9517.
177	26390 Eastgate Blvd	Roseville	PRescott 5-9682.
178	400 Frandor Avenue	Lansing	LAnsing 9-8998.
	109 total Cunningham stores.		

SHAPERO STORES

4	General Motors Building	Detroit 2	TRinity 2-9566.
17	Sherston Cadillac Hotel	Detroit 26	WO 4-8261, 1-8000, Ext. 50.
24	Commodore Perry Hotel, 501 Jefferson	Toledo, Ohio	MA 0827, 0531.
32	Michigan Theater Building	Detroit 26	WO 4-8901, 4-8861.
39	National Bank Building	Detroit 26	WWoodward 4-7773.
42	Penobscot Building	Detroit 26	WO 4-7383, 4-7112.
43	William Penn Hotel, Oliver & Grant	Pittsburgh, Pa.	COurt 1-8321.
63	Ohio Savings Bank Building, 401 Madison	Toledo, Ohio	ADams 0526, 0527.
67	Cleveland Hotel	Cleveland, Ohio	PRospect 1-9100.
71	Netherlands Plaza Hotel, Fifth & Race	Cincinnati, Ohio	Parkway 9074.
126	Statler Hotel	Detroit 26	WWoodward 4-9147.
155	Terrace Plaza Hotel, Sixth & Vine	Cincinnati, Ohio	Parkway 8458.
162	Dixie Terminal Bldg., 49 E. 4th at Maine	Cincinnati, Ohio	CHerry 8487.
173	Statler Centre Drug, 906 W. Seventh	Los Angeles, Calif.	MA 9-9291.
	14 total Shapero stores.		

SCHEITLER DRUG STORES

601	1557 Woodward Ave., David Whitney Bldg.	Detroit 26	WO 2-0540, 2-0541.
604	337 Fisher Road	Grosse Pointe	TU 5-3453, 5-3454.
606	13546 West McNichols	Detroit 21	UN 1-9607, 2-9692.
608	3001 West Grand Blvd., Fisher Bldg.	Detroit 2	TR 5-5384, 5-5385.
609	9801 Linwood	Detroit 6	TY 4-9263, 4-8740.
	5 total Scheitler stores.		

Government Exhibit 30

LEGAL DEPARTMENT

REXALL DRUG COMPANY

R. F. Hallett, Vice President and General Counsel

LOS ANGELES 48, CALIFORNIA, April 27, 1955.

STANLEY N. BARNES,

Assistant Attorney General,

*United States Department of Justice, Washington 25,
D. C.*

Re: United States v. McKesson & Robbins, Inc., Civil No. 76-50,
Your File: SNB: WR 60-21-90

DEAR SIR: I am furnishing the following information in accordance with your recent request in connection with the above matter.

Rexall Drug Company does not itself own or operate any retail drug stores. Its wholly-owned subsidiary, Liggett Drug Company, Inc., owns and operates 132 stores located in the eastern part of the United States, the locations of which are set forth on the attached list on pages 1, 2 and 3. The Owl Drug Co., another wholly-owned subsidiary of Rexall Drug Company, owns and operates 54 stores on the west coast, mainly in California, the locations of which are set forth on the attached list on pages 4 and 5.

To the best of our knowledge all of the stores of Liggett Drug Company, Inc. and The Owl Drug Co. handle some products manufactured by McKesson & Robbins, Inc. The purchases on behalf of the Liggett stores of McKesson & Robbins, Inc. manufactured products are generally made directly from the manufacturing division of that company; although, to a limited degree some of such products may be purchased from the wholesale drug division of McKesson & Robbins, Inc., or in some cases possibly from local independent wholesalers.

The requirements of McKesson & Robbins, Inc. manufactured products for the stores of The Owl Drug Co. are generally made from the wholesale division of McKesson & Robbins, Inc.; although, in a limited number of instances such items might be purchased from local independent wholesalers.

Very truly yours,

R. F. HALLETT.

RFH: mb.
Encs.

472

Current operating stores as of April 26, 1955

Address	City and State
165-7 Main St.	Biddeford, Maine.
16-18 Lisbon St.	Lewiston, Maine.
513 Congress St.	Portland, Maine.
883 Elm St.	Manchester, New Hampshire.
83 Congress St.	Portsmouth, New Hampshire.
36 Church St.	Burlington, Vermont.
375 Washington St.	Boston, Mass.
437 Broadway	Boston, Mass.
76-84 Boylston St.	Boston, Mass.
112-16 Tremont St.	Boston, Mass.
781 Dudley St., Uphams Cor.	Boston, Mass. (Dorchester).
106 Massachusetts Ave.	Boston, Mass.
452-54 Boylston St.	Boston, Mass.
77 Milk St.	Boston, Mass.
1442-52 Dorchester Ave.	Boston, Mass. (Dorchester).
112 Causeway St., North Station	Boston, Mass.
South Station	Boston, Mass.
2220 Washington St.	Boston, Mass. (Roxbury).
683 Veterans of Foreign Wars Parkway	Boston, Mass. (Chestnut Hill).
243-5 Main St.	Webster, Mass.
109 Main St.	Brockton, Mass.
1411 Main St.	Springfield, Mass.
427 Main St.	Worcester, Mass.
249 High St.	Holyoke, Mass.
768 Purchase St.	New Bedford, Mass.
327-29 Broadway	Arlington Centre, Mass.
143 Merrimac St.	Haverhill, Mass.
82-84 Concord St.	Framingham, Mass.
67 Merrimac St.	Lowell, Mass.
497 Main St.	Fitchburg, Mass.
1-3 Main St.	Taunton, Mass.
23 Pleasant St.	Malden, Mass.
361 Essex St.	Lawrence, Mass.
526 Main St.	Worcester, Mass.
304 Center St.	Newton, Mass.
37-45 North St.	Pittsfield, Mass.
508-14 Main St.	Melrose, Mass.
5-11 Main St.	Worcester, Mass.
427 Main St.	Athol, Mass.
1310 Massachusetts Ave.	Cambridge, Mass.
4 Parker St.	Gardner, Mass.
1277 River St.	Hyde Park, Mass.
286 Main St.	Greenfield, Mass.
35 Washington St.	Weymouth, Mass.
265-73 Moody St.	Waltham, Mass.
473 45 N. Washington St.	North Attleboro, Massachusetts.
61 Main St.	North Adams, Massachusetts.
47 S. Main St.	Fall River, Massachusetts.
10 Corinth St.	Roslindale, Massachusetts.
412-14 Main St.	Hyannis, Massachusetts.
535 Lincoln St.	Worcester, Massachusetts.
871 Chapel St.	New Haven, Connecticut.
1 East Main St.	Waterbury, Connecticut.
185 Main St.	Norwich, Connecticut.
360 Main St.	Middleton, Connecticut.
19-25 W. Main St.	Meriden, Connecticut.
200 Atlantic St.	Stamford, Connecticut.
225 Weybosset St.	Providence, Rhode Island.
1764 Broad St.	Cranston, Rhode Island.
124 Thames St.	Newport, Rhode Island.

Address	City and State
76 Broad St	Red Bank, New Jersey.
363-65 High St	Burlington, New Jersey.
576 Cookman Ave. (@ Emden St)	Asbury Park, New Jersey.
98 Nassau St	Princeton, New Jersey.
470-4 Bloomfield Ave	Montclair, New Jersey.
1033 Bloomfield Ave	Clifton, New Jersey.
30th St. Sta. of P. R. R. (Market & Arch Sts.)	Philadelphia, Pennsylvania.
6907 Market St. (@ Terminal)	Upper Darby, Pennsylvania.
1119-23 Chestnut St	Philadelphia, Pennsylvania.
16th St. & Pennsylvania Blvd	Philadelphia, Pennsylvania.
100-2 N. Tryon St	Charlotte, North Carolina.
86-88 Forsyth St., N. E.	Atlanta, Georgia.
175-79 Peachtree St	Atlanta, Georgia.
33 Broad St. S. W. (@ Alabama St.)	Atlanta, Georgia.
996 Peachtree St. N. E.	Atlanta, Georgia.
760 Broad St	Augusta, Georgia.
3081-83 Peachtree Road, N. E.	Atlanta, Georgia.
806 Gordon St., S. W.	Atlanta, Georgia.
134 Main St	East Point, Georgia.
208 Peachtree St., N. E. (Henry Grady Rexall)	Atlanta, Georgia.
30 Marietta St., N. W.	Atlanta, Georgia.
101 Hill St	Griffin, Georgia.
1151 Broadway	Columbus, Georgia.
Pine & Washington Sts	Albany, Georgia.
1- W. Henry St	Savannah, Georgia.
1522 Walton Way	Augusta, Georgia.
477 Peachtree St., N. E.	Atlanta, Georgia.
112 E. Ponce de Leon Ave	Dacula, Georgia.
2131 East Victory Drive	Savannah, Georgia.
225 E. Main St	Lakeland, Florida.
105-7 N. Collins St	Plant City, Florida.
400 Lincoln Road	Miami Beach, Florida.
262 S. Beach St	Daytona Beach, Florida.
3330 Central Ave	St. Petersburg, Florida.
449-63 Central Ave	St. Petersburg, Florida.
1500 Main St	Sarasota, Florida.
(Liquor Store; 1508 th Main St).	
474, 1st & Jackson Sts	Ft. Myers, Florida.
2011 San Marco Pkvd	Jacksonville, Florida.
301 W. Adams St. (G. W. Rexall)	Jacksonville, Florida.
27 N. Main St	Jacksonville, Florida.
2665 Park St. (@ King)	Jacksonville, Florida.
1010 Park St	Jacksonville, Florida.
1754 Main St	Jacksonville, Florida.
253 E. Main St. (@ Roan St.)	Johnson City, Tennessee.
636 Market St	Chattanooga, Tennessee.
527 S. Gay St	Knoxville, Tennessee.
2307 Broad St	Tuscaloosa, Alabama.
1024 S. 20th St	Birmingham, Alabama.
1921 Second Ave	Birmingham, Alabama.
1931 First Ave	Birmingham, Alabama.
5417 First Ave	Birmingham, Alabama.
3232 Ave. W. (Five Points, West)	Birmingham, Alabama.
400 Broad St	Gadsden, Alabama.
11-13 Court Square	Montgomery, Alabama.
1135 Lexington Ave. (@ 79th)	New York, New York.
374 Lexington Ave. (@ 41st St.)	New York, New York.
208 Broadway (@ Fulton St.)	New York, New York.
77-81 E. 42nd St. (Grand Central Station).	New York, New York.

Address	City and State
637 Madison Ave. (@ 59th)	New York, New York.
152 West 42nd St. (@ Broadway)	New York, New York.
(Knickerbocker Bldg.)	
416 Lexington Ave. (@ 43rd)	New York, New York.
399 East 149th St. (@ 3rd Ave)	New York, New York.
310 Main St.	Poughkeepsie, New York.
404-6 Broadway	Saratoga Springs, New York.
162 Genessee St.	Utica, New York.
30 Third St.	Troy, New York.
421-23 Main St.	Little Rock, Arkansas.
601 Texas St.	Shreveport, Louisiana.
302 Third St.	Baton Rouge, Louisiana.
4001 Camp Bowie Blvd.	Fort Worth, Texas.
616 West Magnolia	Fort Worth, Texas.
528 S. Henderson	Fort Worth, Texas.
475 121 N. 4th St. (@ Cooper)	Albuquerque, New Mexico.
400 N. Capitol St. (@ Center)	Salem, Oregon.
151 Grand Ave. (@ Post)	San Francisco, California.
1601 Fillmore St. (@ Geary)	San Francisco, California.
2598 Mission St. (@ 22nd)	San Francisco, California.
701 Market St. (@ 3rd)	San Francisco, California.
157 Montgomery St. (@ Bush)	San Francisco, California.
948 Market St. (@ Mason)	San Francisco, California.
1301 Broadway (@ 13th)	Oakland, California.
2200 Shattuck Ave. (@ Allston Way)	Berkeley, California.
1132 Washington St. (@ 12th)	Oakland, California.
3660 Broadway (@ MacArthur)	Oakland, California.
237 E. 18th St. (Lake Merritt)	Oakland, California.
900 "K" St. (@ 9th)	Sacramento, California.
1932 El Camino Real	Redwood City, California.
8490 Beverly Blvd. (@ La Cienega)	Los Angeles 48, California.
601 S. Broadway (@ 6th)	Los Angeles 14, California.
101 W. 7th St. (@ Main)	Los Angeles 14, California.
202 W. 6th St. (@ Spring)	Los Angeles 14, California.
704 S. Hill St. (@ 7th)	Los Angeles 14, California.
6296 W. Third	Los Angeles 36, California.
5701 N. Figueroa St. (@ Ave. 57)	Los Angeles 42, California.
8719 S. Broadway (near Manchester)	Los Angeles 3, California.
1720 Sunset Blvd. (near Le Moyne)	Los Angeles 26, California.
758 S. Broadway (@ 8th)	Los Angeles 14, California.
11232 S. Western Ave. (@ Imperial)	Los Angeles 47, California.
11726 E. Firestone (@ Pioneer Blvd.)	Norwalk, California.
10830 W. Pico Blvd. (@ Westwood)	Los Angeles 64, California.
426 E. Colorado Blvd. (@ Los Robles)	Pasadena, California.
101 N. Brand Blvd. (@ Broadway)	Glendale, California.
6290 Hollywood Blvd. (@ Vine)	Los Angeles 28, California.
101 N. Greenleaf (@ Philadelphia)	Whittier, California.
100 E. 2nd St. (@ Garey Ave.)	Pomona, California.
1331 Wilshire Blvd. (@ 14th)	Santa Monica, California.
300 N. Beverly Dr. (@ Dayton Way)	Beverly Hills, California.
150 E. Compton	Compton, California.
8200 E. Firestone (@ La Reina St.)	Downey, California.
201 S. Market St. (@ Manchester)	Inglewood, California.
8501 Crenshaw Blvd. (@ 85th)	Inglewood, California.
40 Pine Ave. (@ 1st)	Long Beach, California.
3835 Main St.	Riverside, California.
1260 3rd St. (@ Arizona Ave.)	Santa Monica, California.
6351 Van Nuys Blvd. (@ Friar)	Van Nuys, California.
16623 S. Bellflower	Bellflower, California.
241 E. Main St. (@ Chappell St.)	Alhambra, California.
6633 Atlantic Ave. (@ Bell Pl.)	Bell, California.
601 E. Foothill Blvd.	Azusa, California.

	Address	City and State
	105-107 W. 4th St.	Santa Ana, California.
475	314 Hermosa Ave. (@ Beryl St.).	Redondo Beach, California.
	247 N. Los Robles Ave. (Owl- Alpha Beta Market @ Walnut).	Pasadena, California.
	402 Broadway (@ 4th)	San Diego, California.
	602 Broadway (@ 6th Ave.)	San Diego, California.
	501 University Ave. (@ 5th Ave.)	San Diego, California.
	501 Main St. (@ 5th)	El Centro, California.

477 In the United States District Court for the Southern
District of New York

Notice of appeal to the Supreme Court of the United States

Filed August 5, 1955

[File endorsement omitted.]

[Title omitted.]

I. Notice is hereby given that the United States of America, plaintiff in the above-entitled action, hereby appeals to the Supreme Court of the United States from the final judgment dismissing the complaint of the United States of America, entered in this action on June 6, 1955.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint.
2. Defendant's Answer.
3. Plaintiff's Motion for Summary Judgment.
4. Opinion of Judge Murphy denying Motion for Summary Judgment.
5. Plaintiff's interrogatories.
6. Defendant's answers to interrogatories.
- 478 7. Plaintiff's supplemental interrogatories.
8. Defendant's answer to supplemental interrogatories.
9. Plaintiff's exhibits, G. A. G. B and G. 1 to G. 30.
10. Defendant's admission of facts.
11. Stipulation of facts with respect to competition with wholesalers.
12. Stipulation of facts with respect to single orders from retailers for McKesson products amounting to \$1,000.00 or more.
13. Depositions of Wilbur E. Dewell and Herman C. Nolen.
14. Transcript of the trial record.
15. Opinion of Judge Clancy dismissing complaint, dated June 6, 1955.

16. Plaintiff's Motion for Additional Findings, and court's order of June 22, 1955, denying said Motion.

III. Section 15 U. S. C. 45 (Supp. 1952), the so-called McGuire "fair trade" amendment, exempts from the antitrust laws manufacturers' resale price-maintenance agreements which are valid under State law, but does not exempt agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." The question presented by this appeal is whether the foregoing exemption covers such agreements between a manufacturer who also wholesales its own products and independent wholesalers.¹

Daniel M. Friedman,
DANIEL M. FRIEDMAN,
John Bodner, Jr.,
JOHN BODNER, JR.,

Attorneys for the United States.

Address: Department of Justice, Washington 25, D. C.

479 *Proof of service (omitted in printing)*

480 [Clerk's certificate of foregoing transcript omitted in printing.]

481 Supreme Court of the United States

Order noting probable jurisdiction

December 12, 1955

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

December 12, 1955.

¹ The district court held that the Government, in order to establish that such agreements are illegal, is required to show some "additional restraint." We contend that this ruling was erroneous.

LIBRARY
SUPREME COURT, U.S.

No. **448**

Office - Supreme Court, U.S.
FILED

OGT 4 1955

HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

SIMON E. SOBLOFF,

Solicitor General.

STANLEY N. BARNES,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

JOHN RODNER, JR.,

Attorneys.

Department of Justice,

Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	4
Statement	5
The question is substantial.....	7
Conclusion	11
Appendix	1a

CITATIONS

Cases:

<i>Dr. Miles Medical Co. v. Park & Sons Co.</i> , 220 U.S. 373	8
<i>Doubleday & Co.</i> , 3 CCH Trade Reg. Rep. (9th ed.), ¶ 11,515	9
<i>Eastman Kodak Co.</i> , 3 CCH Trade Reg. Rep. (10th ed.), ¶ 25291	9
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U.S. 384	8, 9
<i>United States v. Bausch & Lomb Co.</i> , 321 U.S. 707	2, 11
<i>United States v. Masonite Corp.</i> , 316 U.S. 265	9
<i>United States v. Socony-Vacuum Co.</i> , 310 U.S. 150	8
<i>United States v. Trenton Potteries Co.</i> , 273 U.S. 392	8
<i>United States v. U. S. Gypsum Co.</i> , 333 U.S. 364	2

Statutes:

Act of July 2, 1890, 26 Stat. 209, Section 1, as amended, 15 U.S.C. 1	2
Federal Trade Commission Act, 38 Stat. 717, Sec. 5(a), as amended by the Act of July 14, 1952, 66 Stat. 632, 15 U.S.C. 45 (a)	5
Section 5(a) (2)	3
Section 5(a) (5)	3

Miscellaneous

	Page.
Wilcox, <i>Public Policies Toward Business</i>	10
Fulda, <i>Resale Price Maintenance</i> , 21 U. of Chi. L. Rev. 175	40
Note, 64 Yale L. J. 426 (1955)	10

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. _____

UNITED STATES OF AMERICA, APPELLANT

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying appellant's motion for summary judgment is reported in 122 F. Supp. 333. The opinion of the court dismissing the complaint is not yet reported. Both opinions are set forth in the Appendix, *infra*, pp. 1a-21a. The court did not enter any separate judgment of dismissal.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 4, commonly known as the Sherman Act, to enjoin violations of Section 1 of that Act. The judgment

of the district court was entered on June 6, 1955, and the notice of appeal was filed in that court on August 5, 1955. The jurisdiction of this Court to review by direct appeal the judgment entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States v. U.S. Gypsum Co.* 333 U.S. 364; *United States v. Bausch & Lomb Co.*, 321 U.S. 707.

STATUTES INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended 50 Stat. 693, 15 U.S.C. 1, commonly known as the Sherman Act, provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agree-

ments of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor

* * *

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. 45(a), provides in part as follows:

(2). Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection; between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

QUESTION PRESENTED

Section 5(a) of the Federal Trade Commission Act, the so-called McGuire "fair-trade" amendment, exempts from the antitrust laws manufacturers' resale price-maintenance agreements which are valid under State law. The exemption does not apply, however, to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." The question presented by this appeal is whether the McGuire amendment exempts from the antitrust laws resale price-maintenance agreements between a manufacturer and independent wholesalers where the manufacturer itself makes substantial wholesale sales in direct competition with the independent wholesalers.

STATEMENT

McKesson & Robbins, Inc. ("McKesson") is both a wholesaler and a manufacturer of drug products. The major part of its business consists of wholesaling drug products manufactured by other concerns.¹ In addition, McKesson manufactures a line of its own trade-marked drug products, which it distributes primarily by direct wholesale sales, but also by sale to independent wholesalers.² The latter compete with McKesson's own wholesale and manufacturing divisions in selling McKesson-brand products to retail outlets.

¹ McKesson is the largest wholesale druggist in the United States; its wholesale sales for the year ending March, 1954, totalled \$338,000,000. McKesson's wholesale division operates a nation-wide network of 74 wholesale outlets in 35 states.

² For the year ended June 30, 1952 total sales of McKesson's own brand products were approximately \$11,000,000. The independent wholesalers sold \$963,000 of this amount.

McKesson sells its own products to the independent wholesalers under resale price-maintenance contracts which require the wholesalers, in reselling such products, to adhere to the prices fixed by McKesson.

On May 27, 1952, the Government filed a complaint charging that McKesson's resale price-maintenance contracts with the independent wholesalers constituted illegal price-fixing in violation of Section 1 of the Sherman Act, and seeking injunctive relief. McKesson admitted the use of such contracts, but claimed that they were exempted from the Sherman Act by the Miller-Tydings and McGuire Acts. The Government moved for summary judgment on the ground that the exemption provided by those Acts does not immunize McKesson's "fair trade" agreements, since it does not cover contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other."

The district court (Judge Murphy) denied the motion. Although the court recognized that "direct price-fixing" is illegal *per se* under the Sherman Act, it was "unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition." The court stated that since Congress had legalized "fair trade" agreements between manufacturers and wholesalers or retailers, "the *per se* judicial condemnation of direct price fixing is hardly appli-

cable simply because the producer is also a wholesaler." The "true test of legality" of "fair trade" agreements by a "producer-wholesaler of dual capacity," the court held, "is whether some *additional* restraint destructive of competition is occasioned."

The case then proceeded to trial before Judge Clancy. The Government sought to prove an "additional restraint" on competition by showing that McKesson gave certain large drug chains special discounts from its published wholesale prices on its own products. On June 3, 1955, Judge Clancy rendered an opinion holding that the Government had failed to prove any "additional restraint," and dismissed the complaint. He "concur[red] in and adopt[ed]" Judge Murphy's "ruling" that "fair trade price fixing by a producer-wholesaler was not *per se* illegal under the Sherman Act." Judge Clancy held that the Government's evidence that McKesson had given special discounts to certain purchasers did not establish an "additional restraint," since there was "nothing" in such evidence "which would support a finding by this Court that this difference of discount by itself or in conjunction with defendant's fair trade price structure in any way restricts competition more than does any fair trade price system."

THE QUESTION IS SUBSTANTIAL

This appeal presents an important statutory question under the antitrust laws which has not been, but should be, resolved by this Court. The question is whether the McGuire Act authorizes a

manufacturer which also wholesales its own products to enter into resale price-maintenance agreements with independent wholesalers to whom it distributes those products and with whom it competes in selling them at wholesale. The court below held that such contracts are legal unless they impose some "additional restraint" upon competition over and above their price-fixing effect. We submit, however, that the McGuire Act does not exempt such contracts from the Sherman Act, and that they are *per se* illegal without regard to whether they impose any additional restraint on competition.

1. Although price-fixing agreements generally are illegal *per se* under Section 1 of the Sherman Act (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States v. Trenton Potteries Co.*, 253 U.S. 392), the Miller-Tydings and McGuire Acts exempt from the antitrust laws resale price-maintenance agreements which cover brand or trade-marked goods and which are valid under state law. But that exemption is only a "limited" one,³ and it specifically does not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." Such agreements, like other forms of horizontal price-fixing among sellers at the same distributive level, remain fully subject to the prohibitions of the Sherman Act.

³ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 388.

Cf. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373.

A manufacturer which distributes its own products directly to retailers functions not only as a manufacturer but also as a wholesaler. McKesson has a substantial volume of direct wholesale sales, and the resale price-maintenance contracts between it and the independent wholesalers are, we submit, contracts "between wholesalers" and therefore not within the exemption of the McGuire Act. Moreover, since there are substantial market areas where McKesson competes as a wholesaler with the independent wholesalers, the contracts are also outside the McGuire Act exemption because they are between firms "in competition with each other." The fact that McKesson also is the manufacturer of the products which it wholesales does not alter its status as a wholesaler in relation to other wholesalers with whom it competes.

The McGuire Act creates an exception to the general rule that all price-fixing is *per se* illegal under the Sherman Act. The legislative history of the Act is, as Judge Murphy pointed out, inconclusive on the question whether Congress intended to exempt from the antitrust laws price-fixing by so-called integrated manufacturers. In the absence of any affirmative legislative history clearly showing that Congress specifically intended to immunize price-fixing by an integrated manufacturer, we submit that the Act should be strictly construed to limit the exemption to manufacturers whose "fair trade" agreements involve only verticle

price-fixing. Cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389-390, 395; *United States v. Masonite Corp.*, 316 U.S. 265, 279-280.⁴

The economic consequences of "fair trade" agreements by integrated manufacturers further support the view that the McGuire Act does not legalize such price-fixing. Under a "fair-trade" pricing system, a non-integrated manufacturer generally sets its resale prices at a level geared to the marketing costs of the independent resale outlet of average efficiency. See Wilcox, *Public Policies Toward Business*, p. 421 (1955); Fulda, *Resale Price Maintenance*, 21 U. of Chi. L. Rev. 175, 189-91 (1954). But an integrated manufacturer is likely to fix resale prices primarily in relation to its own outlets, and if those are inefficient the price thus fixed will tend to be higher than it would be if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431 (1955). Furthermore, a manufacturer which wholesales a substantial volume of its products, such as McKesson, may be encouraged to fix higher resale prices, since the extra profits from the distributive end of the business can be used to offset any drop in manufacturing profits which the higher prices may produce by reducing volume. Thus, there is some

⁴ The Federal Trade Commission has held that the McGuire Act authorizes "fair trade" agreements by integrated manufacturers. *Eastman Kodak Co.*, 3 CCH Trade Reg. Rep. (10th ed.), ¶ 25,291 (1955); see also *Doublada & Co.*, 3 CCH Trade Reg. Rep. (9th ed.), ¶ 11,515 (1953).

economic basis for the view that "fair trade" agreements by integrated manufacturers are more likely to result in higher prices to the consumer than such agreements by non-integrated manufacturers:

2. The question whether the McGuire Act exempts "fair trade" agreements by integrated manufacturers from the antitrust laws calls for a simple "yes" or "no" answer. Neither the language of the Act nor its legislative history afford any basis for the holding of the district court that such agreements are illegal under the Sherman Act only if some "additional restraint" upon competition can be shown.

Price-fixing is illegal *per se*, and unless the McGuire Act exemption covers integrated manufacturers, their "fair trade" contracts are prohibited. Cf. *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721. If, on the other hand, the exemption does cover such contracts, the existence of some "additional restraint" would be immaterial since it would not destroy the exemption. The vice of "fair trade" agreements by integrated manufacturers is that they eliminate price competition between persons at the same distributive level, and that evil results from the price-fixing without more. The district court's test of additional restraint is not only unduly vague, but appears to inject a sort of "rule of reason" into determining the legality of price-fixing—a concept which this Court repeatedly has rejected.

CONCLUSION

The question presented by this appeal is substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

SIMON E. SOBÉLOFF,

Solicitor General.

STANLEY N. BARNES,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

JOHN BODNER, JR.,

Attorneys.

OCTOBER, 1955.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 76-50

UNITED STATES OF AMERICA, PLAINTIFF

against

McKESSON & ROBBINS, INCORPORATED, DEFENDANT

OPINION

MURPHY, D. J.

On this motion for summary judgment by plaintiff under Rule 56, Fed. Rules Civ. Proceed., 28 U.S.C.A., in an action under Section 4 of the Sherman Act¹ seeking adjudication of illegality and injunction, a question of first impression in the courts is presented: Is a manufacturer, who is also a wholesaler and a limited retailer of his own products, as well as a wholesaler of products of other manufacturers, privileged to fix resale prices on his own products with competing wholesalers under federal fair trade statutes? Both the Miller-Tydings² and the McGuire³ acts make lawful "contracts or agreements prescribing minimum [* * *] prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open

¹ Act of July 2, 1890, 26 Stat. 209, 15 U.S.C.A. §4.

² Act of August 17, 1937, 50 Stat. 693, 15 U.S.C.A. §1. See Schwegmann Bros v. Calvert Distillers Corp., 341 U.S. 384.

³ Act of July 14, 1952, 66 Stat. 631-2, 15 U.S.C.A. §45(2).

competition with commodities of the same general class produced or distributed by others, * * *." Both acts make this exception to the privilege in these terms:

"[Nothing quoted above shall] make lawful [any] contracts or agreements providing for the establishment or maintenance of minimum * * * resale prices on any commodity * * * between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."⁴

On this motion it is plaintiff's contention that the "contracts or agreements providing for the establishment or maintenance of minimum * * * resale prices on any commodity", concededly made by defendant through its wholesale drug divisions with competing wholesalers, are ones "between wholesalers * * * or between persons, firms, or corporations in competition with each other." Consequently, not privileged under either fair trade act, they are illegal *per se* as price fixing agreements under the Sherman Act.

Defendant takes the position that the fair trade acts privilege vertical price fixing at different levels, between a manufacturer as seller and wholesalers as buyers, or at least between a manufacturer-wholesaler as seller and other wholesalers as buyers. The explicit exception to this privilege continues the Sherman Act prohibitions against horizontal price fixing by competitors at the same

⁴ 15 U.S.C.A. §1; *id.* §45(5).

functional level. If this construction of the fair trade acts is not a valid one, defendant alternatively contends that genuine issues of material facts remain for resolution before plaintiff may prevail.

The facts, contested and conceded both in the pleadings and in the admissions of facts and answers to interrogatories by defendant, must be considered in order to determine whether or not the principal question posed may be summarily resolved without trial, and if so how.

Defendant is a corporation organized and existing under the laws of the State of Maryland and has its general offices in this judicial district where it transacts business. Defendant is one of the largest wholesalers of drug store merchandise in the United States. It conducts a nation-wide wholesale drug business, operating 74 wholesale drug divisions located in 35 states. Most of its wholesaled drug store merchandise consists of products manufactured, or supplied to it, by other concerns. In addition, at its plant at Bridgeport, Connecticut, the defendant itself manufactures a line of drugs, pharmaceuticals, cosmetics and toilet preparations, or "McKesson products." This case relates solely to restraints on the sale, resale, and distribution of the "McKesson" products manufactured by defendant.

In the conduct of its wholesale drug business the defendant sells drug store merchandise, including McKesson products, to drug stores and other retailers located throughout the United States, for resale to ultimate consumers, and in the conduct of its wholesale drug business the defendant's wholesale drug divisions compete with other wholesalers.

The defendant also sells McKesson products through wholesalers other than its own wholesale divisions for resale to drug stores and other retailers.

Neither the defendant's manufacturing division located at Bridgeport, Connecticut, nor its 74 wholesale drug divisions located in 35 states, are separately incorporated.

Based on admissions and answers of the defendant its sales of McKesson products to other wholesalers fall into four categories: (1) sales of McKesson products by the manufacturing division of the defendant to wholesalers whose trading areas are substantially the same as those of wholesale drug divisions of the defendant of whose trading areas, if not the same as those of wholesale drug divisions of the defendant, materially overlap the trading areas of the defendant's wholesale divisions; (2) sales of McKesson products by the manufacturing division of the defendant to other wholesalers whose trading territories do not substantially overlap the trading territories of the wholesale drug divisions of the defendant but in whose trading territories the manufacturing division of the defendant sells McKesson products direct to retailers; (3) sales of McKesson products by the wholesale drug divisions of the defendant to other wholesalers located in the same city or the same trading territory as a wholesale drug division of the defendant; (4) sales of McKesson products by the manufacturing division of the defendant and by the wholesale drug divisions of the defendant to a few wholesalers with respect to whom the present state of the record is inadequate to establish that the wholesaler competes with either the manufacturing

division of the defendant or a wholesale drug division of the defendant.

With respect to category #1, although defendant's answer to complaint denied "existence of substantial competition with other wholesalers with respect to McKesson products", subsequent answers to interrogatories disclosed sales of such products during the fiscal year 1951-2 by defendant's manufacturing division to such wholesalers amounting to \$283,462. In an admission of facts, it is stated that "wholesale drug divisions of the defendant compete in the sale of McKesson products and other drug products with [such] wholesalers * * * in those places where the trading areas of such wholesalers overlap the trading areas of these wholesale drug divisions: New York, N. Y., Brooklyn, N. Y., Cairo, Illinois, Pittsburgh, Pa., Detroit, Mich., Huntington, W. Va., Akron, Ohio."

Under category #2, i.e., sales by defendant's manufacturing division to wholesalers in areas which do not overlap those traded in by defendant's wholesale division but in which sales are made by defendant's manufacturing division direct to retailers, defendant's answers to interrogatories indicate some sales under such conditions direct to retailers who were parties to defendant's manufacturer-wholesaler fair trade agreement.

In category #3 covering sales of McKesson products by defendant's wholesale division to wholesalers, defendant's answers to interrogatories indicate that its wholesale drug divisions were requested by a vice-president of the defendant in charge of drug merchandising, to forward to the manufacturing division a list of the wholesalers to whom they sold McKesson products, and the wholesale drug di-

visions were instructed not to sell McKesson products to any other wholesaler until they had word from the defendant's manufacturing division that such wholesaler had signed a fair trade contract on those products. The defendant's wholesale drug divisions complied with these instructions and forwarded to the manufacturing division a list of wholesalers, upon receipt of which the manufacturing division requested each such wholesaler to execute a fair trade contract with the manufacturing division of the defendant.

There were 73 such wholesalers located in the same city or near a city or town where defendant's wholesale drug division traded. The annual aggregate of such sales is estimated by defendant to be about \$200,000.

Various forms of defendant's manufacturer-wholesaler and manufacturer-retailer fair trade agreements were used in connection with these sales. Defendant has admitted that in the conduct of its business as a drug manufacturer it sells and ships McKesson products in interstate trade and commerce to wholesalers and retailers of drug store merchandise. The defendant's wholesale drug divisions, except the ones in New York and Brooklyn, sell and ship McKesson products across state lines to retailer customers located in states other than those from which sales and shipments are made.

Defendant contests proof of the existence of competition in three of these four categories. In category #1, defendant has admitted sales by its manufacturing division of \$283,462 during the fiscal year 1951-52, to ten wholesalers who "compete in the sale of McKesson products and other drug prod-

ucts" with seven of defendant's wholesale divisions. This represents only 3 per cent of the total sales made to all wholesalers. Moreover, defendant insists that a "substantial portion of the sales" made by its seven wholesale divisions "was made in portions of their trading areas where no overlap existed." Consequently, defendant urges that an issue of fact remains whether this competition with ten wholesalers is "substantial or *de minimis*."

With respect to category #2, involving direct sales by defendant's manufacturing division, amounting to about \$60,000, to sixteen retailers located in trading areas of twelve wholesalers of defendant's merchandise, defendant contends that such similarity of geography is insufficient to establish a *prima facie* case of competition.

The third category, relating to sales by various of defendant's wholesale divisions to other wholesalers in identical trading areas, are characterized by defendant as mere courtesy sales of small amounts of defendant's brand merchandise. Here again defendant contends that the metes and bounds of trading area is not determinative of the existence of competition because of possible variations in types of merchandise and services offered by each, or in the kind of customers served by each.

The major inquiry is to ascertain the intent of Congress in excluding from the privilege of fair trade, price fixing contracts or agreements between wholesalers, * * * or between persons, firms, or corporations in competition with each other. If defendant was merely a manufacturer, and nothing more, no question concerning its right to the privilege of fair trade would be presented. If defendant was a wholesaler, and nothing more, there would

still be the nice question of construction whether such agreements are unprivileged "between wholesalers", only if they are "in competition with each other", or unprivileged between them regardless of competition.

The heart of the problem presented arises from defendant's dual role as manufacturer and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of defendant's capacities is carefully considered and the other happily ignored. Defendant argues that fair trade agreements are made by its manufacturing division with other wholesalers; plaintiff, that defendant's manufacturing and wholesale divisions are parts of a single corporate entity. Examining the legislative history of the Miller-Tydings and McGuire Acts only confirms the observation of Mr. Justice Jackson with respect to the former statute: "I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us." During debate of the McGuire Act, one Senator expressed his view that "many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded

⁵ Concurring in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 at 397.

commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers."⁶

Similar opinions were voiced by Representatives with respect to both Acts.⁷ Yet our inquiry is not "what the legislator meant; we ask only what the statute means."⁸ The peril of resorting to individual constructions of legislators is not merely that the mandate of the statute would cease to be embodied in its language and become unavailable as warning to the nation at large. It is also that such views may be no more than individual ones. As one Senator exclaimed with respect to the Miller-Tydings Act, "Regardless of the merits of this amendment, it is perfectly obvious that no 5 percent of the membership of the Senate will know anything whatever about the amendment when the Senate votes upon it. It is perfectly obvious that the Senate has reached the point of exhaustion in respect of the consideration of legislation; and if the Senate has any prudent consideration whatever for the country, instead of trying to do some of these intricate things it will quit and go home."⁹

The more carefully considered committee reports, unquestionably deserving weight in this dilemma, are replete with condemnation of "horizontal" and approbation of "vertical" fair trade ar-

⁶ 98 Cong. Rec. 8870, 1952.

⁷ Hearings before Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong. 2d Sess., p. 13, Feb. 4, 1952; 81 Cong. Rec. 8141.

⁸ Holmes, Collected Legal Papers 207.

⁹ 81 Cong. Rec. 7492, July 23, 1937.

rangements.¹⁰ None of these reports come to grips with the instant problem, squarely and unequivocally. Although not controlling here in any event, conflicting judicial and administrative opinion has suggested varying solutions of the problem.¹¹

We reject the suggestion that either of alternate horns must be followed in the dilemma of fair trade agreements with independent wholesalers by a manufacturer who is also a wholesaler, just as much as we believe the labels "vertical" and "horizontal" can offer small solace in a situation where such agreements are capable of operative effect in both of these directions.¹² This court is unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair

¹⁰ Report No. 2053, Senate Committee on the Judiciary, May 12, 1936, p. 2; Report No. 257, Senate Committee on the Judiciary, March 29, 1937, p. 2; Report No. 382, House Committee on the Judiciary, March 11, 1937, p. 2; Report No. 879, Senate Committee on the District of Columbia, July 6, 1937, p. 6; Report of Conference Committee on H. R. 7472, 81 Cong. Rec. 8137, 8138, 1937; H.R. Rep. No. 1437, Committee on Interstate and Foreign Commerce, 82d Cong. 2d Sess. 56, 1952; Sen. Rep. No. 1741, Committee on Interstate and Foreign Commerce, 82d Cong. 2d Sess. June 12, 1952.

¹¹ See *General Electric Co. v. S. Klein on the Square, Inc.*, Sup. Ct., N.Y. Co., Feb. 20, 1953, 129 N.Y.L.J. 583, CCH Trade Reg. Rep. §67443 at par. 68, 249-68, 250; *Raxor Corp., et al v. Goody*, Sup. Ct., N.Y. Co., April 2, 1953, CCH Trade Reg. Rep. §67462 at par. 68, 322; *Matter of Eastman Kodak Co.*, Docket No. 6040, Oct. 9, 1953, CCH Trade Reg. Rep. at par. 11527; *Matter of Doubleday and Company, Inc.*, Docket No. 5897, F.T.C., Sept. 25, 1953, CCH Trade Reg. Rep. at par. 11515; *Eastman Kodak Co. v. Aljan Camera Co., Inc.*, 131 N.Y.L.J. p. 7, col. 3-8, p. 8, col. 1 (June 3, 1954).

¹² Cf. *Matter of Doubleday and Company, Inc.*, Docket No. 5897, F.T.C., Sept. 25, 1953, CCH Trade Reg. Rep. at par. 11515.

trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition. The legislature might well make such appraisal so as to push the line of liability back to the threshold of the bare agreement itself. In their halls the voices of many interests affected may be heard. A judicial forum, where but a few such interests may be weighed, must await the outcome of the patient process of case by case, trial and error method of settling disputes one at a time. Early in the common law housebreakers who entered with felonious intent were branded burglars, and the courts extended this with less severe punishment to attempts. Yet it remained for the legislature to make the necessary appraisal to seal the doom of the man found in the street with pick-lock in his pocket.

Despite occasional contrary intimations,¹³ direct price-fixing has been condemned as unlawful and an unreasonable restraint of trade without regard to the reasonableness of the prices fixed and irrespective of whether prices were actually raised or lowered.¹⁴ While this has been an early judicial

¹³ See *Chicago Board of Trade v. United States*, 246 U.S. 231; *National Association of Window Glass Mfrs. v. United States*, 263 U.S. 403; *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 179; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377.

¹⁴ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States v. Trenton Potteries Co.*, 273 U.S. 392; *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290; *United States v. Joint Traffic Assn.*, 171 U.S. 505; *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211; *Swift & Co. v. United States*, 196 U.S. 375; *Standard Sanitary Mfg. v. United States*, 226 U.S. 20; *F. T. C. v. Pacific States Paper Trade Assn.*, 273 U.S. 52. See also *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U.S. 373, 408-409.

development, direct price-fixing had^e been condemned as illegal *per se* at common law prior to the Sherman Act.

But such threshold *per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality. The mischief of price fixing consists of the rigidity injected into the price structure which makes it unresponsive to normal pressures of supply and demand. Inflexibility inherent in fixation is an evil without regard to the reasonableness of the price. To permit private fixing would require constant judicial supervision of reasonableness and lead inevitably to the necessity of administrative price fixing by the government itself. To some extent similar mischief may attend direct price fixing by producers for wholesalers and retailers. Price competition on a single brand of merchandise is eliminated and not necessarily that occasioned by unrestrained price cutting and "loss leader"¹⁴ selling. Price reductions made possible by low cost store management, inventory control, or low-rent store location are not possible on such fair-traded items. A cushioned margin of profit may help inefficient distributors in the field and stifle the initiative of ones who would seek to increase their volume by price reductions based on economies.¹⁵ But the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise—the loss to the manufacturer of his good will, destruction of the independent retailer's competi-

¹⁵ Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d Sess. 314, 318, 323 (1952).

tive position and the consequent dilution of standards of quality for the consumer. And in the light of such legislative appraisal and approbation, the *per se* judicial condemnation of direct price fixing is hardly applicable simply because the producer is also a wholesaler.

Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-wholesaler is insufficient to make out a *prima facie* case of restraint of trade under the Sherman Act. Are all such agreements privileged or only some of them? If the latter, what then is the line of demarcation between valid and illegal ones? We think the test consists of a factual showing of illegality. And this is not met simply by pointing to *some* restraint of competition. As Mr. Justice Brandeis observed: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."¹⁶

Since every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the "true test of legality" in the situation of the producer-wholesaler of dual capacity is whether some *additional* restraint destructive of competition is occasioned. A showing of actual or potential competition in such situation between the producer-controlled wholesaler and the independent one would be material but not deter-

¹⁶ Chicago Board of Trade v. United States, 246 U.S. 231, 238.

minative of such additional restraint destructive of competition. On the other hand, such agreements might violate the Sherman Act, without any showing of competition. If, for example, it could be established that a producer became a wholesaler, though not in competition with an independent wholesaler, and stipulated prices for his own and the independent wholesaler as a first step toward and with intent to gouge consumers, that might suffice *prima facie* as violation of the Sherman Act outside the privilege of the fair trade statutes. The weight then to be given to an item of proof, such as competition between the controlled and independent wholesaler, will necessarily depend upon circumstances. In a continuum of probability, it may range from zero to evidence of preponderant probative force, depending upon the business setting. No inflexible standard should be laid down to govern in advance.

In the instant case, plaintiff has neither alleged nor made any factual showing of such additional restraint. Plaintiff suggests an evil similar to that condemned in *United States v. Masonite Corp. et al.*¹⁷ That case did not involve fair trade agreements, but rather a familiar attempt by a patentee, through agency and licensing arrangements, to extend a patent monopoly beyond limits of the patent and anti-trust statutes. Even considered as fair trade agreements a sufficient factual showing of illegality existed because several competing manufacturers, unrelated as buyers and sellers, agreed upon prices at which the product of one such manufacturer should be sold in competition

¹⁷ 316 U.S. 265.

with that of the others. Plaintiff claims that "the very existence of the price-fix on McKesson products may induce a competing wholesaler to buy McKesson products from the defendant rather than purchase other products that compete with McKesson products from some other manufacturer with whom the wholesaler is not in competition." Absent some factual showing that such is the case, we are unable to accept the proposition upon the force of its circumstantial probability, or at least to hold that its bare assertion amounts *prima facie* to a factual showing of illegality.

Upon the present state of the record then, plaintiff's motion for summary judgment must be denied without prejudice, of course, to its renewal upon a showing of additional uncontested facts in accordance with this opinion, or, if such facts are disputed, a showing of such additional facts on trial.

On two additional grounds, independent of those discussed above relating to defendant's dual capacity as manufacturer and wholesaler, plaintiff seeks summary judgment. One is that defendant's fair trade contracts contain an illegal boycott provision by requiring the reselling buyer to agree that not only the purchaser but also "any subsequent purchaser will not, in turn, resell them at less than the prescribed net retail minimum prices published by SELLER."¹⁸ Defendant denies present use of this clause, and an issue of fact is presented. The second ground concerns illegality of defendant's

¹⁸ Cf. *Masters Inc. v. Sunbeam Corporation, et al.*, D.C.S.D. N.Y., 112 F. Supp. 268 with *Sunbeam Corporation v. Payless Drug Stores, et al.*, N.D. Cal., 113 F. Supp. 31 and Act of July 14, 1952; 66 Stat. 631-2, 15 U.S.C.A. §45(2).

contracts with certain wholesalers located in Michigan, Georgia and Florida because allegedly in violation of the laws of those states. Defendant denies fair trade in these areas in violation of the State statute and accordingly a second issue of fact is presented. On these grounds then, plaintiff's motion for summary judgment is denied because of the existence of a triable issue of material fact.

Plaintiff's motion for summary judgment is accordingly denied.

Dated, New York, N. Y., July 1, 1954.

(S.) THOMAS F. MURPHY,
U. S. D. J.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CIV. 76-50

UNITED STATES OF AMERICA, PLAINTIFF

against

McKESSON & ROBBINS, INCORPORATED, DEFENDANT

OPINION

CLANCY, D. J.

Findings of Fact

1. Defendant, operating through 74 divisions located in 35 states, conducts nationwide, a wholesale business in drugs, pharmaceutical, surgical and medical supplies, toilet articles and sundry other items customarily sold in drug stores.

2. Defendant also manufactures its own line of drug products which are packaged and sold.

under its brand name of "McKesson Products". Large annual gross sales of its own products are made by its own wholesale divisions, other wholesale competitors and directly by it to large retailers.

3. With both the wholesale competitors and the large retailers, defendant, in accord with the Fair Trade laws of the several states permitting them, enters into fair trade price fixing agreements affecting retail sales of its own products.

4. Defendant's fair trade contracts for the sale of its own products to wholesalers provide for a maximum resale discount of ten and five percent. Defendant's fair trade contracts with retailers provide for a discount of twenty percent for purchases in excess of \$1,000. Defendant's retail customers are mostly chain stores. Some sales of \$1,000 or more of its products are made by other wholesalers to retailers but such instances are rare.

5. Immediately after the decision of the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, defendant employed a fair trade agreement with its wholesaler purchasers which contained a clause adapted to control the sales price to successive purchasers of its products. This action was started in May, 1952. The McGuire Act was passed in July, 1952. Defendant stopped using the clause in April, 1953. The accused clause of the contract employed by the defendant during this period was on its face an effort to meet the *Schwegmann* decision. Defendant's position was that of all manufacturers in that its rights under the anti-trust laws and the state fair trade laws were indeterminate and unsettled. Its discontinuance of the use of its clause was not too long after

the McGuire Act was enacted, and there is no reason now to assume the possibility of further use of it. After reading the disputed clause, the Court is of the opinion that to render any decision on the legality of its use by the defendant in this case in the circumstances in which it operated from 1951 to 1953 would be futile. So would be the award now of an injunction against its reuse.

6. Defendant has had price fixing agreements in some states which, since the commencement of this action, have declared their fair trade laws unconstitutional. There is no evidence in this case that defendant has entered into or continued any fair price contract in any state after the local fair trade law was declared unconstitutional. In fact, the defendant's contracts now provide that they are only binding if legal under the state law. Again, the Court sees no reason why this defendant should be admonished for accepting a legislative enactment as constitutional until it was found not to be.

CONCLUSION OF LAW

1. Judgment is granted dismissing the complaint.

The Government in this case moved for summary judgment on the theory that any price fixing agreement which was made with competing wholesalers by defendant as a wholesaler as well as a manufacturer, was a per se violation of the Sherman Act.

Judge Murphy, denying the Government's motion, said: "The heart of the problem presented rises from defendant's dual role as manufacturer

and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of defendant's capacities is carefully considered and the other happily ignored. * * * Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-wholesaler is insufficient to make out a prima facie case of restraint of trade under the Sherman Act. Are all such agreements privileged or only some of them? If the latter, what then is the line of demarcation between valid and illegal ones? We think the test consists of a factual showing of illegality."

Judge Murphy's ruling that fair trade price fixing by a producer-wholesaler was not per se illegal under the Sherman Act, was necessary to his decision of the motion, and we regard it as the law of the case. In any event we concur in and adopt his decision.

"The only question that remains after the trial of this case is, did the Government make out a "factual showing of illegality" by proving some additional restraint of competition by the defendant which, in conjunction with their fair trade price fixing, would constitute a violation of the Sherman Act?"

The Government has submitted proof that the defendant as a producer entered into fair trade contracts with large retailers which provided for a 20 percent discount for purchases in excess of \$1,000. Defendant's fair trade contracts with independent wholesalers allow a discount of 10 and 5 percent off list. It is the Government's contention that this is an additional restraint that ren-

ders the defendant's entire fair trade system a violation of the Sherman Act.

The defendant contends that the evidence of this discount to large retailers is not relevant or material under the allegations of the Government's complaint. An examination of the complaint shows that it was directed at defendant's fair price agreements with competing wholesalers. In fact, paragraph 8 of the complaint lists only independent wholesalers as co-conspirators. The Government's new claim makes them the injured victims of conspiring retailers though nowhere in the complaint is there any mention of a conspiracy or agreements with retailers. But the Government insists that the proof is coherent and within the issues in that the difference in defendant's discounts to wholesaler and retailer buyers infects all the wholesalers' fair trade agreements, making them instruments for illegal restraint.

Accepting this theory, we hold that the proof submitted does not show the additional restraint it is intended to demonstrate.

There is nothing in the evidence submitted by the Government which would support a finding by this Court that this difference of discount by itself or in conjunction with defendant's fair trade price structure in any way restricts competition more than does any fair trade price system.

Defendant vouchsafes the explanation that the 20 percent discount merely reflects the fair value of the wholesaler's services in warehousing and handling performed by the large retailer and that such a retailer is not a potential customer of the independent wholesaler. The Government contends that it is used by the defendant to eliminate

the competition of the independent wholesalers for the large retail business.

Whether the difference of discount is a fair and legitimate quantitative price discount in no wise affecting competition or is a means of restricting competition, this Court has no way of determining. The few facts do not speak for themselves. The burden of proof was the Government's. The complaint must be dismissed.

Dated: New York, N. Y., June 3, 1955.

(S.) JOHN W. CLANCY,
United States District Judge.

Judgment entered:

WILLIAM V. CONNELL,
Clerk.

JUNE 6, 1955.

LIBRARY
SUPREME COURT, U.S.

No. 448

Office - Supreme Court, U.S.

FILED

NOV 23 1955

HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

SIMON E. SOBELOFF,

Solicitor General,

STANLEY N. BARNES,

Assistant Attorney General,

Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 448

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

1. In its motion to affirm, the appellee ("McKesson") does not dispute the important character of the questions presented on this appeal. Indeed, McKesson itself emphasizes—perhaps unduly—that these questions have "possible far-reaching economic and social consequences" (Motion to Affirm, p. 4). McKesson urges, however, that "this particular record does not present an adequate occasion for this Court to consider and determine [these] questions. . . ." (Motion to Affirm, p. 4). In an apparent effort to avoid the seemingly plain language of this Court in the

Schwegmann case,¹ McKesson contends that, "On the specific record in this case, there was shown to be no substantial competition on the same functional level between McKesson and any of the parties with whom it has made fair trade contracts" (Motion to Affirm, p. 3).

This startling contention has no support in the district court's findings and cannot be reconciled with McKesson's admissions below. For the year ended June 30, 1952, total sales of McKesson's own brand products were \$10,422,965. Of this amount, sales to 148 independent wholesalers were approximately \$963,000. Nearly 50% of these sales, totalling \$483,462, were made to 137 independent wholesalers whose trading areas were substantially identical or materially overlapping with those of McKesson's wholesale divisions.² An additional \$265,810 in sales was made to 6 independent wholesalers whose trading areas overlapped, but less materially, those of McKesson's wholesale divisions. Thus, out of the 148 independent wholesalers involved, 143 were engaged in competition with McKesson wholesale divisions in the sale of McKesson products to retailers. More-

¹ *Schwegmann Bros. v. Calvert Corp.*, 341 U. S. 384, 389: "... the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level."

² Of this amount, sales by the manufacturing division were \$283,462 and sales by wholesale divisions were approximately \$200,000.

over, twelve of the independent wholesalers—including the five not otherwise in competition with McKesson—served trading areas in which there were located large retailers who made direct purchases from McKesson's manufacturing division.³

The substantial nature of the competition involved is even more apparent when considered in terms of the total amount of goods in competition. For this purpose, the amount of McKesson products sold by independent wholesalers in competition with McKesson (*supra*) reveals the scope of only one side of the competition. To this amount must be added the amount of McKesson products sold by McKesson in competition with the independent wholesalers. McKesson's manufacturing division, for example, made sales in the amount of \$283,462 to ten independent wholesalers whose trading areas are substantially identical or materially overlapping with seven of McKesson's wholesale divisions. These seven wholesale divisions made sales of McKesson products in the amount of \$786,309. Thus, in these trading areas alone, the total amount of goods in competition was approximately a million dollars. This amount represents "an appreciable amount of commerce under any standard" (*United States v. Yellow Cab Co.*, 332 U. S. 218, 225-226) and "cannot be said to be insignificant or insubstantial" (*Inter-*

³ For the year in question, direct sales by the manufacturing division to large retailers amounted to \$1,352,521.

national Salt Co. v. United States, 332 U. S. 392, 395, 396).

2. Although the case is undoubtedly of wide importance, we doubt that the impact of a decision in favor of the Government will necessarily be as far-reaching as McKesson predicts. In several respects, on the facts of this case, the issue before the Court is a narrow one. The Court, if it wishes, could properly reverse the decision below without even reaching the broader questions which McKesson seeks to interject. Contrary to McKesson's assertion, the Court need not decide whether a manufacturer is a "wholesaler" solely because it sells its own goods to retailers or whether a fair trade contract "between wholesalers" is invalid even in the absence of competition between them. Instead, the central issue before the Court is whether a price-fixing agreement "between persons, firms, or corporations in competition with each other" is exempt from Sherman Act prohibitions *merely because there is a seller-buyer relationship between the parties to the agreement*. Only in the event that this Court sustains such an exemption will it be necessary to pass on the questions raised by the "between

wholesalers" clauses of the Miller-Tydings and McGuire Acts.⁴

McKesson is also in error in imputing to the Government the "bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler, in the distribution of his own products. . . ." (Motion to Affirm, p. 3). The Government makes no such contention. Except in those states where fair trade is not permitted, drug retailers are bound, either by contract or non-signer provisions, to sell McKesson products only at the prices fixed by McKesson. Such use of fair trade is not challenged here (except possibly insofar as a temporary suspension may be necessary for the purpose of dissipating the effects of the charged antitrust violation). McKesson and such retailers are not "persons, firms, or corporations in competition with each other." What the Government does challenge, however, is McKesson's use of fair trade to bind independent wholesalers who, unlike the retailers, are engaged in

⁴ In this connection it may be noted that McKesson is not in the position of a manufacturer that merely distributes its own goods. The company is admittedly the largest drug wholesaler in the United States. For the fiscal year ended March 31, 1954, the sales of all drug products by McKesson's wholesale drug divisions amounted to \$338,000,000.

competition with McKesson.⁵ No other issue is before the Court. In order that this issue may be resolved, probable jurisdiction should be noted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General,

STANLEY N. BARNES,
Assistant Attorney General.

NOVEMBER 1955.

⁵ McKesson appears to contend that the provisos to the Miller-Tydings and McGuire Acts merely prohibit agreements "fixing the prices at which *two or more* competitive products are to be sold" (Motion to Affirm, p. 6). [Italics theirs.] Without attempting a detailed answer at this preliminary stage, we would point out that this very contention was made in the court below but was not accepted. The court instead rested its decision on far narrower grounds. The same contention, moreover, was expressly rejected by the Federal Trade Commission in *Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th ed.), par. 25,291, on which McKesson relies. And see *United States v. Masonite Corp.*, 316 U. S. 265, 279-280.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED

MAR 3 1956

HAROLD B. WILLEY, Clerk

No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON AND ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

NIMON E. SOBLOFF,

Solicitor General,

STANLEY H. BARNES,

Assistant Attorney General,

RALPH S. SPITZER,

Assistant to the Solicitor General,

Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Summary of argument	13
Argument	22
I. McKesson's price-fixing agreements with independent wholesalers are illegal <i>per se</i> unless exempt under the Miller-Tydings and McGuire Acts	25
A. The District Court erred in holding the <i>per se</i> doctrine inapplicable	25
B. Application of the <i>per se</i> doctrine would require condemnation of the challenged agreements	35
II. McKesson's agreements with the independent wholesalers are not exempt under the Miller-Tydings and McGuire Acts	38
A. The agreements are "between wholesalers" and "between persons, firms, or corporations in competition with each other" in the plain and ordinary sense of those terms	38
B. Application of the Miller-Tydings and McGuire Acts in strict accordance with their terms avoids dangers which Congress could reasonably apprehend	41
C. The existence of a seller-buyer relationship between McKesson and the independent wholesalers is not controlling so long as there is also a competitive relationship between them	48

Argument—Continued

II. McKesson's agreements—Continued

Page

D. The legislative history of the Miller-Tydings and McGuire Acts affords no basis for a different construction.....	53
1. The Miller-Tydings Act.....	55
2. The McGuire Act.....	62
E. Contrary to McKesson's assertion, the construction urged here would not destroy the "fair trade" exemption....	69
Conclusion.....	72

CITATIONS

Cases:

<i>Apex Hosiery Co. v. Leader</i> , 310 U. S. 469.....	25
<i>Brown v. Board of Education</i> , 347 U. S. 483.....	54
<i>Chicago Board of Trade v. United States</i> , 246 U. S. 231.....	30
<i>Dr. Miles Medical Co. v. Park & Sons Co.</i> , 220 U. S. 373.....	14, 25, 28, 35
<i>Doubleday Doran Co.</i> , CCH Trade Reg. Rep., par. 11,515.....	51
<i>Eastman Kodak Co. v. Schwartz</i> , 133 N. Y. S. 2d 908.....	51
<i>Eastman Kodak Co.</i> , CCH Trade Reg. Rep., par. 25,291.....	49, 50-51
<i>Eastman Kodak Co.</i> , CCH Trade Reg. Rep., par. 11,527.....	51
<i>Ethyl Gasoline Corp. v. United States</i> , 309 U. S. 436.....	25, 28, 29, 34
<i>Fashion Originators' Guild v. Federal Trade Commission</i> , 312 U. S. 457.....	25
<i>Federal Trade Commission v. Beech-Nut Packing Co.</i> , 257 U. S. 441.....	28
<i>Frey & Son, Inc. v. Cudahy Packing Co.</i> , 256 U. S. 208.....	28
<i>General Electric Co. v. S. Klein on the Square, Inc.</i> , 121 N. Y. S. 2d 37.....	51
<i>Harrison v. Northern Trust Co.</i> , 317 U. S. 476.....	54

Cases—Continued

Page

<i>International Salt Co. v. United States</i> , 332 U. S. 392	37
<i>Kiefer-Stewart Co. v. Joseph E. Seagram & Sons</i> , 340 U. S. 211	26, 27, 28
<i>McCaughn v. Hershey Chocolate Co.</i> , 283 U. S. 488	55
<i>Old Dearborn Distributing Co. v. Seagram Corp.</i> , 299 U. S. 183	28
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U. S. 384	9,
14, 15, 17, 22, 23, 26, 27, 28, 32, 33, 34, 39, 41, 48, 53, 55, 61.	
<i>Standard Oil Co. v. United States</i> , 221 U. S. 1	26
<i>United States v. American Tobacco Co.</i> , 221 U. S. 106	52
<i>United States v. Bauseh & Lomb Co.</i> , 321 U. S. 707	15, 26, 28, 29, 34
<i>United States v. Frankfort Distilleries, Inc.</i> , 324 U. S. 293	26, 29
<i>United States v. Masonite Corp.</i> , 316 U. S. 265	15,
18, 19, 26, 27, 28, 29, 34, 39, 41, 45-46, 48, 49, 52.	
<i>United States v. New Wrinkle, Inc.</i> , 342 U. S. 371	26
<i>United States v. New York Central R. Co.</i> , 263 U. S. 603	68
<i>United States v. Paramount Pictures, Inc.</i> , 334 U. S. 131	26, 38
<i>United States v. A. Schrader's Son, Inc.</i> , 252 U. S. 85	28
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U. S. 150	14, 25, 26, 27, 28, 30, 38, 45, 51
<i>United States v. Trans-Missouri Freight Association</i> , 166 U. S. 290	25, 61
<i>United States v. Trenton Potteries</i> , 273 U. S. 392	14,
25, 26-27, 30	
<i>United States v. United States Gypsum Co.</i> , 333 U. S. 364	48
<i>United States v. Univis Lens Co.</i> , 316 U. S. 241	15,
18, 26, 28, 29, 34, 40	
<i>United States v. Yellow Cab Co.</i> , 332 U. S. 218	37

Statutes:

Page

Act of July 2, 1890, 26 Stat. 209, Section 1, as amended, 15 U. S. C. 1	2, 14, 23, 24, 25, 38, 39
Federal Trade Commission. Act, 38 Stat. 719, Section 5 (a), as amended by the Act of July 14, 1952, 66 Stat. 632, 15 U. S. C. 45 (a)	4, 14, 23, 24
Section 5 (a) (2)	4, 38
Section 5 (a) (5)	4, 38
Congressional material:	
80 Cong. Rec. 8433	55
81 Cong. Rec. 7486-7487, 7488-7497, 8137-8143	56,
	57, 58, 59
97 Cong. Rec. 13404	62
98 Cong. Rec. 4896-4926, 4933-4956, 8716-8748, 8819-8858, 8865-8873, 8881-8890, 8891-8892	49,
	61, 64, 65, 66, 67, 68
Hearings before Senate Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d sess., pp. 17, 137, 225	65
H. R. 7472, 75th Cong.	55, 56
H. R. 1611, 81 Cong. Rec. 34	55, 59
H. R. 5767, 82d Cong., 2d sess.	62
H. R. 6925, 82d Cong., 2d sess.	63
H. Rep. 382, 75th Cong. 1st sess.	55, 56
H. Rep. 1437, 82d Cong., 2d sess.	63
H. Rep. 516, 82d Cong., 2d sess.	63
S. 100, 81 Cong. Rec. 66	55, 56
S. 3822, 74th Cong., 2d sess.	55, 56
S. Rep. 2053, 74th Cong., 2d sess.	55, 56
S. Rep. 257, 75th Cong., 1st sess.	55, 56
S. Rep. 879, 75th Cong.	55, 56
S. Rep. 1741, 82d Cong., 2d sess.	65

Miscellaneous:

Federal Trade Commission, Report of, on <i>Resale Price Maintenance</i> (1945), pp. 80-81	33, 57
Frankfurter, <i>Some Reflections on the Reading of Statutes</i> ; 47 Col. L. Rev. 527	55
Holmes, <i>Collected Legal Papers</i> , p. 207	54
Note, 50 Nw. U. L. Rev. 78, 86-87	45
Note, 64 Yale L. J. 426	44

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 448

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON AND ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court denying appellant's motion for summary judgment (R. 16) is reported at 122 F. Supp. 333. The opinion of the district court dismissing the complaint (R. 180) is as yet unreported.

JURISDICTION

The final judgment of the district court was entered on June 6, 1955 (R. 183). Notice of appeal was filed in that court on August 5, 1955 (R. 250). This Court noted probable jurisdiction on December 12, 1955 (R. 251). The jurisdiction of this Court is conferred by Section 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTION PRESENTED

The Miller-Tydings and McGuire Acts exempt certain so-called "fair trade" agreements from the prohibitions of the antitrust laws. By express provision, however, the exemption does not extend to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." The question presented by this appeal is whether the exemption applies to "fair trade" agreements between a manufacturer and independent wholesalers where the manufacturer itself sells at wholesale in competition with the independent wholesalers.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, commonly known as the Miller-Tydings Act, 15 U. S. C. 1, provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or

container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire Act, 15 U. S. C. 45 (a), provides in part as follows:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

* * * * *

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of

this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

STATEMENT

INTRODUCTION

This is a civil action under Section 4 of the Sherman Act charging McKesson & Robbins ("McKesson") with violation of Section 1 of the Act and seeking appropriate injunctive relief. The alleged violations involved certain of McKesson's "fair trade" contracts.

The complaint (R. 1) was filed on May 27, 1952. On July 1, 1954, the district court denied the Government's motion for summary judgment (R. 16). At the trial (R. 163-180), held on May 18, 1955, no testimony was taken; the case was submitted solely on depositions, exhibits, stipulations, and other documentary evidence. Thereafter, on June 6, 1955, the district court ordered the complaint dismissed (R. 183). The present appeal is from that decision.

THE DISTRIBUTION OF MC KESSON BRAND PRODUCTS

McKesson, a Maryland corporation with its home office in New York City (R. 17), is the largest drug wholesaler in the United States (R. 141). Operating through 74 wholesale divisions

located in 35 states (R. 17, 36), McKesson sells drug store merchandise of various brands to retailers, principally drug stores, substantially throughout the nation (R. 17, 147). For the fiscal year ended March 31, 1954, the sales of all drug products by McKesson's wholesale divisions amounted to approximately \$338,000,000 (R. 140-141).

McKesson is also a manufacturer of a line of drug products, hereinafter referred to as "McKesson brand products" (R. 17). For the fiscal year ended March 31, 1954, total sales of McKesson brand products amounted to approximately \$11,000,000 (R. 66). McKesson's manufacturing operation is conducted through a single manufacturing division located at Bridgeport, Connecticut (R. 17). This division, like each of McKesson's 74 wholesale divisions, has a separate headquarters and a separate staff of employees (R. 7, 72). None of the 75 divisions, however, is separately incorporated (R. 18, 38, 54, 70). All are component parts of the same corporation and are responsible to the corporation's president and board of directors (R. 70, 71).

To the extent permissible under state law, McKesson requires the retailers of McKesson brand products to sell such products at "fair trade" retail prices fixed by McKesson (R. 6, 181). These prices are set forth in published schedules of wholesale and retail prices (opposite R. 37 and opposite R. 199). McKesson distributes its own

brand products to retailers through two channels: (1) directly to retailers; and (2) through independent wholesalers (R. 17-18). The pertinent facts concerning each of these two channels of distribution may be briefly summarized.

(1) DIRECT SALES TO RETAILERS

The major portion of McKesson brand products is distributed through McKesson's own wholesale divisions. For such merchandise, the wholesale division receiving the shipment makes "payment" to the manufacturing division "by check" sent to McKesson's home office (R. 54, 103-105).² The wholesale division in turn sells the merchandise to retailers at wholesale prices specified in McKesson's published price schedules.¹

McKesson also makes direct sales of McKesson brand products through its manufacturing division. These sales are made to a group of retailers—mostly drug store chains—who are considered "desirable accounts" (R. 77, 201). For the fiscal year ended June 30, 1952, the aggregate sales of McKesson brand products by the manufacturing division to retailers amounted to \$1,352,521 (R. 201, 60).

(2) SALES THROUGH INDEPENDENT WHOLESALERS

In addition to making direct sales to retailers, McKesson distributes its own brand products

¹ As pointed out in the text *infra*, McKesson's wholesale divisions also make substantial sales of McKesson brand products to independent wholesalers.

through independent wholesalers. McKesson's sales to independent wholesalers are made primarily through its manufacturing division (R. 37). These sales are made under "fair trade" contracts requiring the wholesalers, in reselling the products, to adhere to the prices fixed by McKesson. For the fiscal year ended June 30, 1952, such sales were made to 21 independent wholesalers and amounted to \$763,767 (R. 30). Sixteen of the 21 are engaged in competition with McKesson's wholesale divisions,² and the remaining five are in competition with McKesson's manufacturing division.³

² See McKesson's "Admission of facts" (R. 61) and "Stipulation of facts" (R. 61-63).

Ten of the 16 serve trading areas which are substantially identical or materially overlapping with those of McKesson's wholesale divisions (R. 30-31, 37). Sales by the manufacturing division to these ten wholesalers amounted to \$283,462 for the year ended June 30, 1952 (R. 30-31, 37).

The other six serve trading areas also overlapping (but less materially) with those of McKesson's wholesale divisions (R. 61-63). These six are as follows: (1) Kiefer-Stewart Drug Co., Indianapolis, Ind.; (2) Charles Leich and Co., Evansville, Ind.; (3) Pennsylvania Wholesale Drug Co., Wilkes-Barre, Pa.; (4) Smith, Kline and French, Philadelphia, Pa.; (5) Kauffman-Lattimer Co., Columbus, Ohio; (6) Owens and Minor Drug Co., Richmond, Va. Sales by the manufacturing division to these six wholesalers amounted to \$265,810 for the year ended June 30, 1952 (R. 37).

³ The remaining five wholesalers are as follows: (1) District Wholesale Drug Co., Washington, D. C.; (2) H. B. Gilpin Co., with branches at Washington, Baltimore, and Norfolk; (3) M. Breuner and Son, Harrisburg, Pa.; (4) Krull Wholesale Drug Co., Philadelphia, Pa.; (5) Shoemaker and Busch, Philadelphia, Pa. (R. 37). Sales by the

McKesson also makes sales of McKesson brand products to independent wholesalers through its wholesale divisions. For the fiscal year ended June 30, 1952, such sales amounted to approximately \$200,000 (R. 56-57, 209-210). On June 6, 1951, shortly after this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, the wholesale divisions were advised by the company's vice-president in charge of drug merchandising that "none of our wholesale divisions will sell any McKesson labeled products to any wholesaler who has not entered into a fair trade contract with McKesson Laboratories" (R. 50). To carry out that policy, each wholesale division was requested to send the manufacturing

manufacturing division to these five wholesalers amounted to \$214,495 for the year ended June 30, 1952 (R. 37).

The manufacturing division competes with each of the five (among others) by selling direct to chain drug stores located in the wholesalers' trading areas (R. 201, 60). For example, the manufacturing division solicits and makes direct sales of McKesson brand products to Peoples Drug Stores, which has its home office and a number of stores in Washington, D. C., where District Wholesale Drug Co. and H. B. Gilpin Co. have their home offices (R. 90, 202-205). As another example, the manufacturing division solicits and makes direct sales to Sun Ray Drug Co., which has its home office and a number of stores in Philadelphia, where Krull Wholesale Drug Co. and Shoemaker and Busch have their home offices (R. 96, 234-235). It is customary, in fact, for such retailers to purchase some McKesson brand products from local wholesalers (either McKesson wholesale divisions or independent wholesalers) as well as from the manufacturing division (R. 143, 144, 145, 203, 216, 222, 224, 228, 231, 232, 234-235, 239, 243, 246).

division a list of independent wholesalers to whom the wholesale division sold McKesson brand products (R. 50). In response, the names of 127 independent wholesalers were submitted; and of this number, 73 entered into "fair trade" agreements with McKesson (R. 56, 58-60). Each of the 73 is in competition with the McKesson wholesale division from which it makes its purchases (R. 148, 150-151).

McKesson's price schedules (opposite R. 37 and opposite R. 199) specify a wholesale list price for each McKesson brand product and also provide for certain discounts "off list" varying in size with the size of the retailer's purchase.⁴ During the fiscal year in question (the year ended June 30, 1952), and in fact until March 21, 1955, the maximum discount allowed under the schedules was "10% and 5% off list" for purchases over \$250 (R. 129, 209, 181). This limitation, on the other hand, was not applicable to sales by McKesson's manufacturing division directly to large retailers, and such retailers during the same period received a discount of 20% off list on every

⁴ The *manufacturer's price*—the price at which the manufacturing division sells McKesson brand products to independent wholesalers—is determined by deduction of a flat discount of 25% from the specified wholesale list price (R. 200, 131). With respect to purchases from McKesson wholesale divisions, independent wholesalers pay the specified wholesale list price less 16 $\frac{2}{3}$ % (R. 200, 131).

order of \$1,000 or more (R. 84, 200).⁵ On March 21, 1955, after the taking of depositions in the instant case, McKesson issued a new schedule providing that McKesson's fair trade wholesale prices do not apply on orders of \$1,000 or more (R. 129, 209). Prior to that date, independent wholesalers handling McKesson brand products were not authorized under their fair trade contracts with McKesson to grant discounts larger than "10% and 5% off list" (R. 84, 106-107).

DISTRICT COURT PROCEEDINGS

The Government's complaint (R. 1) charged that McKesson's "fair trade" contracts with the independent wholesalers constituted illegal price-fixing in violation of Section 1 of the Sherman Act. McKesson's answer (R. 5) admitted the use of such contracts, but claimed that they were exempted from the Sherman Act by the Miller-Tydings and McGuire Acts.

The Government moved for summary judgment (R. 11) on the ground that these Acts, which expressly exclude contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other," do not immunize the challenged agreements. The district court, Judge Murphy sitting, denied the motion (R. 16).

⁵ Despite this difference in discounts, some independent wholesalers and some McKesson wholesale divisions filled single orders from retailers for McKesson brand products amounting to \$1,000 or more, although such instances have been rare (R. 64, 181).

Although the court recognized that the legislative history of the Miller-Tydings and McGuire Acts was inconclusive (R. 20-21) and that "direct price-fixing" is illegal *per se* under the Sherman Act (R. 22), it was "unwilling, at this stage of case law development of legislatively sanctioned resale price fixing" (R. 21), to apply the *per se* rule "in fair trade situations absent a factual showing of illegality" (R. 22). Such a showing, moreover, could not be made "simply by pointing to *some* restraint of competition * * *" (R. 22-23, emphasis added); the court noted that "every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition." (R. 23.) The "true test of legality" of "fair/ trade" agreements between a "producer-wholesaler of dual capacity" and independent wholesalers, the court held, "is whether some *additional* restraint destructive of competition is occasioned" (R. 23, emphasis added).

The case then proceeded to trial before Judge Clancy (R. 163-180). The Government, pursuant to Judge Murphy's opinion, sought to prove an "additional restraint" on the competition between McKesson and the independent wholesalers by evidence of McKesson's special discounts to certain large drug chains (R. 174-175). After the trial, Judge Clancy ordered the complaint dismissed (R. 180). He "concur[red] in and adopt[ed]" Judge Murphy's "ruling that fair trade price fixing by a producer-wholesaler was

not *per se* illegal under the Sherman Act" (R. 182) and held that the Government's evidence did not establish an "additional restraint" within the meaning of the test enunciated by Judge Murphy (R. 183).⁶

SUMMARY OF ARGUMENT

In the Miller-Tydings and McGuire Acts, Congress exempted certain resale price maintenance agreements from the prohibitions of the antitrust laws. Both Acts expressly provide, however, that the exemption shall not apply to price-fixing agreements "between wholesalers" and "between persons, firms, or corporations in competition with each other." These provisos continue * * * the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level."

⁶ In conjunction with his opinion, Judge Clancy made six findings of fact, dealing generally with McKesson's distribution practices (R. 180-181). Thereafter the Government moved the court to make additional findings to "clarify the Record for the purposes of the plaintiff's appeal" (R. 184). After argument, Judge Clancy denied the motion from the bench, stating that "Rule 52 (b) does not warrant any judge's making a finding after the entry of judgment, unless for the purpose of changing the original decision" (R. 199). Judge Clancy added that he had "examined, by the way, the proposed new findings" and that he "thoroughly disagree[d] with the plaintiff that many of them are supported by the evidence" (R. 199).

Schwegmann Bros. v. Calvert Distillers Corp.,
341 U. S. 384, 389.

McKesson is not only a manufacturer but is also a wholesaler. The instant suit challenges resale price maintenance agreements between McKesson and 94 independent wholesalers with whom McKesson competes in the sale of McKesson brand-products. It is the Government's position that these agreements are unmistakably agreements "between wholesalers" and/or "between persons, firms, or corporations in competition with each other" and hence cannot be deemed exempt under the Miller-Tydings and McGuire Acts.

I

A. In the absence of a special exemption, price-fixing agreements in or affecting interstate commerce have long been condemned by this Court under the Sherman Act. Moreover, because of the inherent effect of such agreements on competition, the "rule of reason" applicable to certain other forms of restraint has been rejected in this area. In short, such agreements are illegal *per se*. No principle is more firmly established in the law of antitrust. *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150.

Since the 1911 decision in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, this principle has frequently been applied to price-fixing agreements—so-called resale price maintenance

agreements—between a manufacturer and its dealers. *E. g., United States v. Masonite Corp.*, 316 U. S. 265; cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384. All such agreements in or affecting interstate commerce, this Court has made clear, are illegal *per se*, “except as the seller moves along the route which is marked by the Miller-Tydings Act” (*United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721) and the subsequent McGuire Act. See also *United States v. Univis Lens Co.*, 316 U. S. 241, 252.

Against this background, the decision below can only be understood as a direct challenge to the *per se* doctrine and as an attempt to rekindle a controversy long settled by this Court. The district court concluded that “such threshold *per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality” (R. 22). According to the court, moreover, such a showing could not be made “simply by pointing to *some* restraint of competition” (R. 22–23, emphasis added). The “true test of legality,” the court stated, is “whether some *additional* restraint destructive of competition is occasioned” (R. 23, emphasis added). Thus the court, while paying lip service to the *per se* doctrine, in fact rejected it “in fair trade situations” and replaced it with the court’s own conception of an appropriate “rule of reason.”

In reaching its decision, the court did not even purport to rely on any language in the Miller-Tydings and McGuire Acts or their legislative history. Instead, after pointing out the economic evils of resale price-maintenance, the court relied on the fact that "the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise" (R. 22) and decided in favor of legalizing resale price maintenance. But, as this Court's decisions demonstrate, there is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The exemption obviously did not immunize *all* resale price maintenance agreements. The question in each case is whether the challenged agreement is inside or outside the exemption. If the agreement is found to be inside the exemption, the agreement is legal by any standard. On the other hand, if the agreement is found to be outside the exemption, there is no reason to judge the legality of the agreement by any more lenient standard than any other non-exempt price-fixing agreement. Either the agreement is exempt or not exempt. No reason has been advanced for judicially creating a third category of agreements which are outside the exemption but which should nevertheless be spared from application of the *per se* doctrine.

B. To establish the illegality of the challenged agreements, therefore, no showing of "additional restraint" or "factual showing of illegality" need be made. Unless exempt under the Miller-Tydings and McGuire Acts, the agreements are illegal *per se*.

Application of the *per se* doctrine in the instant case is particularly appropriate.. For the challenged agreements not only eliminate competition among the independent wholesalers (as do all "fair-trade" agreements between a manufacturer and independent wholesalers) but, in addition, *eliminate competition between McKesson and the independent wholesalers*. In selling McKesson brand products to retailers, each of the 94 independent wholesalers is in competition with either a McKesson wholesale division or McKesson's manufacturing division.

II

A. Once it is determined that the challenged agreements are illegal *per se* unless exempt, the only question remaining is whether the agreements are entitled to the protection of the Miller-Tydings and McGuire Acts. A proviso in each Act, as already noted, denies protection to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other."

If these terms are taken "in their normal and customary meaning," *Schwegmann Bros. v. Cal-*

vert Distillers Corp., 341 U. S. 384, 388, it would be indisputable that the challenged agreements are within the scope of the provisos and hence not exempt. With respect to the "between wholesalers" phrase, both parties to each of the challenged agreements—McKesson and one of the independent wholesalers—operate wholesale firms that distribute McKesson brand products to retailers. McKesson, in fact, is the largest drug wholesaler in the country. Similarly, McKesson and the independent wholesalers are "persons, firms, or corporations in competition with each other." All 94 of the independent wholesalers are engaged in competition with either a McKesson wholesale division or McKesson's manufacturing division.

Interpreting these provisos according to their ordinary meaning is especially appropriate in view of this Court's mandate to limit antitrust exemptions "strictly to the terms of the statutory grant." *United States v. Univis Lens Co.*, 316 U. S. 241, 251; *United States v. Masquite Corp.*, 316 U. S. 265, 280.

B. Congress, moreover, could reasonably have determined to withhold the benefits of the "fair trade" exemption in this area. The construction urged here avoids the evil of "horizontal" agreements—the elimination of competition between the parties. This evil, not present in the ordinary "fair trade" agreement, is present in especially objectionable form in a "fair trade" agree-

ment between a manufacturer-wholesaler and a competing independent wholesaler; for the manufacturer-wholesaler, because of its leverage as a manufacturer of a line of trade-marked products, is thus able to dictate its competitors' prices on these products. Cf. *United States v. Masonite Corp.*, 316 U. S. 265, involving a remarkably similar price-fixing arrangement.

The potentialities of abuse through such agreements are well illustrated by the instant case. McKesson's agreements with the independent wholesalers accomplished two purposes. First, the agreements prevented the independent wholesalers from underselling McKesson's wholesale divisions. Second, the agreements enabled McKesson's manufacturing division to undersell the independent wholesalers in dealing with the large "desirable accounts." Such use of "fair trade," we believe, is consistent with neither the language nor the aim of the Miller-Tydings and McGuire Acts.

Other economic dangers inhere in agreements of this type. If a manufacturer's own wholesale outlets are inefficient, he may seek to meet the problem by setting his "fair trade" price higher than otherwise. And independent wholesalers may be influenced to handle the products of a manufacturer which has its own wholesale outlets merely because of the added advantage of minimizing competition with those outlets. See *United States v. Masonite Corp.*, *supra*.

C. McKesson, however, takes the position that the provisos have no application to "fair trade" agreements—that is, agreements between a producer or distributor, on the one hand, and their customers, on the other. According to McKesson, because of the seller-buyer relationship involved in such agreements, the parties to "fair trade" agreements can never be "in competition with each other at the same functional level." More specifically, McKesson contends that its seller-buyer relationship with the independent wholesalers renders the provisos inapplicable to the 94 challenged agreements.

But this emphasis on the seller-buyer relationship between the parties completely ignores the competitive relationship also existing between the same parties. McKesson's manufacturing and wholesaling operations are conducted by a single corporation administered by a single president and controlled by a single board of directors. For purposes of bookkeeping or internal administration, a corporation can sub-divide itself into as many component divisions as it wishes. It cannot, however, escape civil or criminal liability by the simple device of treating such divisions as independent entities. For the acts of any one of the divisions, the corporation is responsible.

Thus, when McKesson's manufacturing division entered into the 94 agreements challenged here, it did so on behalf of the corporation—not just the manufacturing division. And the corpora-

tion, primarily through its wholesale divisions and to some extent through its manufacturing division itself, competes with the independent wholesalers "on the same functional level"—i. e., in selling McKesson brand products at wholesale to retailers. McKesson's relationship with the independent wholesalers, therefore, is not simply one of seller-buyer but also one of competitor *vis-a-vis* competitor. Unless the substance of the challenged agreements is to be subordinated to the form in which McKesson has cast them, this competitive relationship precludes any exemption for the agreements under the Miller-Tydings and McGuire Acts.

D. The legislative history of the Miller-Tydings and McGuire Acts affords no justification for the construction urged by McKesson. The committee reports, as the district court noted (R. 21), "are replete with condemnation of 'horizontal' and approbation of 'vertical' fair trade arrangements" and do not "come to grips with the instant problem, squarely and unequivocally." The same is true of statements by individual legislators who either introduced the bills or served on committees that had considered the provision in question. With respect to statements by other individual legislators—e. g., Senator Humphrey during the Senate debate on the McGuire Act—at best they are inconclusive. While the Humphrey statement may appear to

support McKesson's construction, it is hardly sufficient in itself to override the unambiguous language of the provisos, especially in view of the many expressions of opposition, during the House and Senate debates, to "horizontal" price-fixing between competitors.

E. McKesson urges that the Government's construction of the provisos would substantially destroy the "fair trade" exemption. Such fears, to say the least, are considerably exaggerated. The only price-fixing agreements in controversy are those between McKesson and the independent wholesalers. And cancellation of these agreements will not relieve retailers of any obligation they may have under state "fair trade" laws to adhere to McKesson's retail price schedule. Moreover, the only manufacturers that would be affected by a decision invalidating such agreements are those who distribute their products both through their own selling organization and through independent outlets, and even then only to the extent that the manufacturer's own selling organization is *in competition* with the independent outlets.

ARGUMENT

The issue before the Court is a narrow one. No constitutional problems are involved; the matter is purely one of statutory interpretation. Compare *Schwegmann Bros. v. Calvert Distillers*

Corp., 341 U. S. 384. The issue may be stated simply as follows: whether a manufacturer like McKesson, which distributes its products both through its own selling organization and through independent wholesalers engaged in competition with its own selling organization, can legally fix the resale prices of the competing independent wholesalers. More specifically, the case relates solely to the legality of 94 price-fixing agreements, each between McKesson on the one hand and an independent wholesaler on the other.

In the Miller-Tydings Act of 1937, Congress exempted certain price-fixing agreements from the prohibitions of the antitrust laws. The Act expressly provided, however, that the exemption shall not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." In reference to this proviso, this Court in *Schwegmann*, *supra*, noted "that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." 341 U. S. at 389. In 1952, after the *Schwegmann* decision, which held that the Miller-Tydings Act did not validate "non-signer" provisions of state "fair trade" laws, Congress enacted the McGuire Act for the purpose of validating such provisions, and thus broadened the

scope of the "fair trade" exemption.' In precisely the same language as the Miller-Tydings Act, however, the McGuire Act expressly provides that the exemption shall not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other."

Notwithstanding these provisos in the Miller-Tydings and McGuire Acts, the court below sustained the legality of McKesson's price-fixing agreements with the independent wholesalers (R. 16). On the ground that the "*per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality" (R. 22), the court held that such contracts are valid unless they impose some "additional restraint" on competition over and above their ordinary price-fixing effect (R. 23).

It is the Government's position that McKesson's price-fixing agreements with independent wholesalers are illegal *per se* without regard to any "additional restraint." This position is set forth below in terms of two basic propositions: (1) that the agreements are illegal *per se* unless exempt under the Miller-Tydings and McGuire Acts; (2) that the agreements are not exempt un-

Whereas the Miller-Tydings Act was enacted as an amendment to the Sherman Act, the McGuire Act was enacted as an amendment to the Federal Trade Commission Act. As a consequence, the narrower Miller-Tydings Act remains in force. □

der the Miller-Tydings and McGuire Acts. The first relates to the Government's burden of proof; the second relates to McKesson's defense based on the claimed exemption.

I. McKesson's Price-Fixing Agreements With Independent Wholesalers Are Illegal *per se* Unless Exempt Under the Miller-Tydings and McGuire Acts.

A. THE DISTRICT COURT ERRED IN HOLDING THE PER SE DOCTRINE INAPPLICABLE

In the Sherman Act, Congress decreed that "competition not combination, should be the law of trade." *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493. Completely at war with this policy, as this Court has recognized, is the device of the price-fixing agreement; for "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries*, 273 U. S. 392, 397; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. Accordingly, since the very inception of the Sherman Act, such schemes have repeatedly been condemned by this Court. *E. g.*: *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 408; *United States v. Trenton Potteries*, *supra*; *Ethyl Gasoline Corp. v.*

United States, 309 U. S. 436, 458; *United States v. Socony-Vacuum Oil Co.*, *supra*; *United States v. Univis Lens Co.*, 316 U. S. 241, 252-253; *United States v. Masonite Corp.*, 316 U. S. 265, 274; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 720; *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296; *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 143; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 213; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 386; *United States v. New Wrinkle, Inc.*, 342 U. S. 371, 377.

These decisions, moreover, establish the principle that the illegality of price-fixing agreements does not depend on a showing of the unreasonableness of the particular practice. Because of the inherent effect of such agreements on competition, the "rule of reason" applicable to certain other forms of restraint has been rejected in this area; price-fixing agreements have been conclusively presumed to be unreasonable.* In determining the legality of any given price-fixing agreement, it has been deemed immaterial whether prices are raised, lowered, or maintained at existing levels (*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 213); whether the prices set are fair or unfair (*United States v.*

* This was recognized in the very decision first articulating the "rule of reason" in Sherman Act cases. *Standard Oil Co. v. United States*, 221 U. S. 1, 65.

Trenton Potteries, 273 U. S. 392, 397); whether the agreement fixes minimum, maximum, or specific prices (*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 213; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 386); whether the price-fixing is accomplished by express contract or by more subtle means (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 222-223); whether the participants possess market control (*id.* at 221); whether the amount of commerce affected is large or small (*id.* at 225, n. 59); whether the motives of the participants are good or evil (*id.* at 222); whether the agreement will prove beneficial in curbing competitive "abuses" (*id.* at 218; *United States v. Masonite Corp.*, 316 U. S. 265, 276); or whether the effect of the combination may be to increase or decrease the distribution of the price-fixed article (*ibid.*). As this Court has said: "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. * * * [T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221-222. In short, absent a special exemption by Congress, price-fixing agreements in or affecting interstate commerce are not only illegal but are illegal *per se*. No

principle is more firmly established in the law of antitrust.*

Since the 1911 decision in *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*, this principle has frequently been applied to price-fixing agreements—so-called resale price maintenance agreements—between a manufacturer and its dealers. *E. g.*: *Ethyl Gasoline Corp. v. United States*, *supra*; *United States v. Univis Lens Co.*, *supra*; *United States v. Masonite Corp.*, *supra*; *United States v. Bausch & Lomb Co.*, *supra*, Cf. *Schwetmann Bros. v. Calvert Distillers Corp.*, *supra*.¹⁰ By means of such agreements, the manufacturer seeks to control the price at which the dealers may resell the manufacturer's product. Such a manufacturer "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." *Dr. Miles Medical Co. v. Park &*

* In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, this Court declared that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act. * * ." Subsequent decisions have re-affirmed this principle. *E. g.*, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 213.

¹⁰ See also *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, 99-100; *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 452-453; *Old Dearborn Distributing Co. v. Seagram Corp.*, 249 U. S. 183, 188.

Sons, 220 U. S. 373, 408. The *per se* doctrine applies even as against attempts by a patentee to fix resale prices on the patented article. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 457-458; *United States v. Univis Lens Co.*, 316 U. S. 241, 252; *United States v. Masonite Corp.*, 316 U. S. 265, 282. The doctrine thus covers the entire field of resale price maintenance agreements in or affecting interstate commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act" (*United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721) and the subsequent McGuire Act. See also *United States v. Univis Lens Co.*, 316 U. S. 241, 252; *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296.

Against this background, the decision below can only be understood as a direct challenge to the *per se* doctrine and as an attempt to rekindle a controversy long settled by this Court. Judge Murphy's opinion acknowledges the economic "mischief" of resale price maintenance agreements (R. 22):

Price competition on a single brand of merchandise is eliminated, and not necessarily that occasioned by unrestrained price cutting and "loss leader" selling. Price reductions made possible by low cost store management, inventory control, or low-rent store location are not possible on such fair-traded items. A cushioned margin of profit may help inefficient distribu-

tors in the field and stifle the initiative of ones who would seek to increase their volume by price reductions based on economies.

The opinion also acknowledges that "direct price-fixing has been condemned as unlawful and an unreasonable restraint of trade without regard to the reasonableness of the prices fixed and irrespective of whether prices were actually raised or lowered" (R. 22). The court nevertheless refused to apply this rule in the instant case. The court concluded that "such threshold *per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality" (R. 22). Such a showing, it was stated, could not be made "simply by pointing to *some* restraint of competition" (R. 22-23, *emphasis added*).¹¹ In the court's view, the "true test of legality" is "whether some *additional* restraint destructive of competition is occasioned"

¹¹ For this proposition, the court cited *Chicago Board of Trade v. United States*, 246 U. S. 231, 238. But the *Board of Trade* case did not involve an agreement, as here, designed to fix a market price and eliminate competition; rather, "[t]he restriction was upon the period of price-making." 246 U. S. 231, 239. In issue was an exchange rule prohibiting members from purchasing or offering to purchase certain grains, from the closing of the session until its opening the next day, at a price other than the closing bid. The narrow scope of the *Board of Trade* decision was pointed out in *United States v. Trenton Potteries*, 273 U. S. 392, 401, and *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 217.

(R. 23, emphasis added). This test might be met, the court indicated by way of illustration, if it could be shown that a producer-wholesaler entered into resale price maintenance agreements with independent wholesalers "as a first step toward and with intent to gouge consumers" (R. 23). The court warned, however, that "[n]o inflexible standard should be laid down to govern in advance" (R. 23).

Thus the court, while paying lip service to the *per se* doctrine, in fact rejected it "in fair trade situations" and replaced it with the court's own conception of an appropriate "rule of reason." It is a contradiction in terms to say, as the court did, that the *per se* doctrine is inapplicable "absent a factual showing of illegality." The whole import of the *per se* doctrine is that no such "factual showing of illegality" (a term repeated four times in the court's opinion, R. 22-24) need be made. Moreover, the test which the court adopted in lieu of the *per se* doctrine will, in all probability, be impossible to satisfy in most cases. For proof that the agreements occasion "some additional restraint destructive of competition"—*e. g.*, proof that they were made "as a first step toward and with intent to gouge consumers"—will as a practical matter be ordinarily unavailable. The result is not far different from an outright grant of immunity to such agreements.

In reaching this decision, the district court did not even purport to rely on any language in the

Miller-Tydings or McGuire Acts. Nor did it rely on the legislative history of the two statutes; Judge Murphy found the legislative history of the two statutes to be "‘unedifying and unilluminating’" (R. 20).¹² Instead, after pointing out the economic evils of resale price maintenance, the court relied on the fact that "the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise" (R. 22) and decided in favor of legalizing resale price maintenance. "[I]n the light of such legislative appraisal and approbation" (R. 22), the court concluded that the *per se* doctrine was inappropriate here and that only a showing of restraint over and above the ordinary effect of price-fixing agreements would suffice (R. 23). This conclusion, we submit, is erroneous.

There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The exemption certainly did not immunize all resale price maintenance agreements. Only particular types of such agreements were immunized and then only under specified conditions. Moreover, these conditions are more stringent than comparable conditions in state "fair

¹² Quoting from Mr. Justice Jackson's concurring opinion in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 397.

trade" legislation.¹³ "We start then with a federal act which does not * * * turn over to the states the handling of the whole problem of resale price maintenance on this type of commodity. What is granted is a limited immunity * * *"

Schwegmann Bros v. Calvert Distillers Corp., 341

U. S. 384, 388. The question in each case is

whether the challenged agreement is inside or outside the exemption. If the agreement is

found to be inside the exemption, the agreement is legal by any standard. On the other hand, if

the agreement is found to be outside the exemption, there is no reason to judge the legality of the

agreement by any more lenient standard than any other non-exempt price-fixing agreement. The

question in each case thus calls for a "yes" or "no" answer. Either the agreement is exempt

or not exempt. No reason has been advanced for judicially creating a third category of agreements

which are outside the exemption but which should nevertheless be spared from application of the

per se doctrine. By hypothesis Congress has not included such agreements within the scope of its

legislative largesse.

¹³ For example, the provisos to the Miller-Tydings and McGuire Acts deny an exemption to "persons, firms, or corporations in competition with each other." This clause is not present in the provisos of any of the state "fair trade" acts, which generally exclude only, "any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices." Report of the Federal Trade Commission on *Resale Price Maintenance* (1945), pp. 80-81.

The decisions of this Court support this analysis. On at least four occasions since enactment of the Miller-Tydings Act, this Court has struck down resale price maintenance agreements as illegal *per se*. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 458; *United States v. Univis Lens Co.*, 316 U. S. 241, 252-253; *United States v. Masonite Corp.*, 316 U. S. 265, 274; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 720. And in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 386, although consensual agreements were not directly involved, the resale price maintenance scheme there under review was held to be unprotected by the Miller-Tydings Act and hence illegal *per se*. In none of these cases was the "legislative appraisal and approbation" of some types of resale price maintenance allowed to affect in any way the application of the *per se* test to other restraints in the same general field. Similarly, in connection with other exemptions, the "legislative appraisal and approbation" of some protection for patentees did not deter this Court from applying the *per se* test to resale price maintenance agreements purportedly based on patents. Such a scheme "derives no support from the patent and must stand on the same footing under the Sherman Act as like stipulations with respect to unpatented commodities" (*Univis*, p. 251) and is "subject to the general law" (*Masonite*, p. 277). See also *Ethyl Gasoline Corp. v. United States*, *supra*.

B. APPLICATION OF THE PER SE DOCTRINE WOULD REQUIRE
CONDEMNATION OF THE CHALLENGED AGREEMENTS

Unless exempt, McKesson's agreements with the independent wholesalers must likewise stand "on the same footing under the Sherman Act" as any other non-exempt price-fixing agreement and are likewise "subject to the general law." Otherwise stated, unless this Court should find that they come within the specific terms of the statutory exemption (discussed in Point II) conferred by the Miller-Tydings and McGuire Acts, the agreements are illegal *per se*.¹⁴

From the standpoint of the Sherman Act, as already indicated, the vice of ordinary resale price maintenance agreements (agreements between the manufacturer of a branded product, on the one hand, and his dealers, on the other) is that they curb competition among the dealers. See *Dr. Miles* case, *supra*, 220 U. S. at 408. Here, of course, the contracts go further (a factor of crucial importance, as we indicate in Point II, for purposes of determining whether they can qualify under the exemption provisions involved). The 94 challenged agreements not only eliminate competition among the independent wholesalers but also eliminate competition between McKesson and the independent wholesalers. Seventy-three of the independent wholesalers compete with McKesson wholesale divi-

¹⁴ It is not controverted (see R. 6) that the agreements and the commerce to which they relate are interstate in character.

sions located in the same communities as the 73 independent wholesalers.¹⁵ Ten of the other independent wholesalers compete with McKesson wholesale divisions whose trading areas are substantially identical, or materially overlapping, with those of the ten independent wholesalers.¹⁶ An additional six independent wholesalers compete with McKesson wholesale divisions whose trading areas also overlap, but less materially, those of the six independent wholesalers.¹⁷ And many of the independent wholesalers—including the five not otherwise in competition with McKesson—serve trading areas in which there are located large retailers who make direct purchases from McKesson's manufacturing division.¹⁸

The substantial nature of the competition involved is even more apparent when considered

¹⁵ These agreements relate to sales to independent wholesalers by McKesson wholesale divisions. See Statement, *supra*, pp. 9-10. The other 21 agreements relate to sales to independent wholesalers by McKesson's manufacturing division.

¹⁶ For the year ended June 30, 1952, sales by the manufacturing division to these independent wholesalers amounted to \$283,462. See Statement, *supra*, p. 7.

¹⁷ For the year ended June 30, 1952, sales by the manufacturing division to these independent wholesalers amounted to \$265,810. See Statement, *supra*, p. 8, n. 2.

¹⁸ For the year ended June 30, 1952, sales by the manufacturing division to these five wholesalers amounted to \$214,495. During the same period, sales by the manufacturing division to large retailers amounted to \$1,352,521. It is customary for such retailers to purchase some McKesson brand products from local wholesalers (either McKesson wholesale divisions or independent wholesalers) as well as from the manufacturing division. See Statement, *supra*, pp. 8-9, n. 3.

in terms of the total amount of goods in competition. For this purpose, the amount of McKesson brand products sold by independent wholesalers in competition with McKesson (*supra*) reveals the scope of only one side of the competition. To this amount must be added the amount of McKesson brand products sold by McKesson in competition with the independent wholesalers. For example, the trading areas of ten independent wholesalers who compete with McKesson are substantially identical, or materially overlapping, with the trading areas of seven of McKesson's wholesale divisions (R. 61). For the year ended June 30, 1952, McKesson's sales to these independent wholesalers amounted to \$283,462 (R. 31). During the same period, the seven wholesale divisions involved made sales of McKesson brand products in the amount of \$786,309 (R. 31). Thus, in these few trading areas alone, the total amount of goods in competition was approximately a million dollars. This amount represents "an appreciable amount of commerce under any standard" (*United States v. Yellow Cab Co.*, 332 U. S. 218, 225-226) and "cannot be said to be insignificant or insubstantial" (*International Salt Co. v. United States*, 332 U. S. 392, 395, 396). Particularly is this so in a price-fixing case, since "Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of commerce

involved * * *." *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 173; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59.

II. McKesson's Agreements With the Independent Wholesalers Are Not Exempt Under the Miller-Tydings and McGuire Acts

A. THE AGREEMENTS ARE "BETWEEN WHOLESALERS" AND "BETWEEN PERSONS, FIRMS, OR CORPORATIONS IN COMPETITION WITH EACH OTHER" IN THE PLAIN AND ORDINARY SENSE OF THOSE TERMS

In defense of the validity of its agreements with the independent wholesalers, McKesson relies on the Miller-Tydings and McGuire Acts. Like the Miller-Tydings Act (pp. 2-3, *supra*) on which it is patterned, paragraph (2) of the McGuire Act (pp. 4-5, *supra*) exempts certain types of resale price maintenance agreements relating to certain types of trade-marked commodities. We may assume, for the sake of discussion, that paragraph (2), without more, would immunize the challenged agreements. Paragraph (5), however, provides:

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or*

between retailers, or between persons, firms, or corporations in competition with each other. [Emphasis added.]

The italicized language is derived from an almost identical proviso in the Miller-Tydings Act, which provides that the exemption—

shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* [Emphasis added.]

This proviso, as this Court has stated, “expressly continues the prohibitions of the Sherman Act against ‘horizontal’ price fixing by those in competition with each other at the same functional level.” *Schwegmann Bros. v. Calvert Corp.*, 341 U. S. 384, 389; *United States v. Masonite Corp.*, 316 U. S. 265, 279, n. 4. It is the Government’s position that the challenged agreements cannot be held exempt under the Miller-Tydings and McGuire Acts for the reason that they are resale price-fixing agreements “between wholesalers” and/or “between persons, firms, or corporations in competition with each other.”

If these terms are taken “in their normal and customary meaning,” *Schwegmann Bros. v. Cal-*

vert Corp., 341 U. S. 384, 388, it seems plain that the 94 challenged agreements are within the scope of the provisos and hence not exempt. With respect to the "between wholesalers" phrase, it is conceded that the parties to each of the 94 challenged agreements—McKesson and the respective independent wholesalers—operate wholesale firms that distribute McKesson brand products to retailers. McKesson, in fact, is the largest drug wholesaler in the country. Similarly, McKesson and the independent wholesalers are "persons, firms, or corporations in competition with each other." As shown in the preceding section, all but five of the 94 independent wholesalers are engaged in competition with McKesson's wholesale divisions, and the remaining five are in competition with McKesson's manufacturing division. Even assuming *arguendo* that any question existed as to the applicability of the "between wholesalers" phrase because of McKesson's role as a manufacturer as well as a wholesaler, no such objection can be raised against the "corporations in competition" phrase. It would be difficult, indeed, to select words more descriptive of the 94 agreements.

Interpreting the provisos according to their ordinary meaning is especially appropriate in view of this Court's mandate to limit antitrust exemptions "strictly to the terms of the statutory grant." *United States v. Univis Lens Co.*, 316

U. S. 241, 251; *United States v. Masonite Corp.*, 316 U. S. 265, 280. And see *Schwegmann Bros. v. Calvert Corp.*, 341 U. S. 384, 388, 390. If the policy were otherwise, the general law of competition as expressed in the Sherman Act might be emasculated by a proliferation of "implied" exemptions. And where a strict construction of an antitrust exemption results in an interpretation that accords with the common usage of the language, a defendant seeking a broader interpretation has a doubly heavy burden—one which can be sustained only by showing, beyond doubt, that Congress must have had a contrary purpose.

B. APPLICATION OF THE MILLER-TYDINGS AND MC GUIRE ACTS IN STRICT ACCORDANCE WITH THEIR TERMS AVOIDS ECONOMIC DANGERS WHICH CONGRESS COULD REASONABLY APPREHEND

There are, moreover, good reasons for withholding the benefits of the "fair trade" exemption in this area. It is one thing to exempt, for example, resale price maintenance agreements between independent wholesalers and a manufacturer that distributes its trade-marked product exclusively through independent wholesalers; the parties to such an agreement do not operate on the same functional level and hence the agreement does not relieve the manufacturer of any competition. But it is quite another thing to exempt resale price maintenance agreements between independent wholesalers and a manufacturer-whole-

saler that distributes its trade-marked product partly through its own wholesale outlets in competition with the independent wholesalers; the parties to such an agreement do in fact operate on the same functional level and hence the effect of the agreement is to eliminate competition *between the parties*. It is this factor—not present, as already noted, in the ordinary “fair trade” agreement—that makes so-called “horizontal” agreements invalid. The vice is present in particularly objectionable form in a “fair trade” agreement between a manufacturer-wholesaler and a competing independent wholesaler; for the manufacturer-wholesaler, because of its leverage as a manufacturer of a line of trade-marked products, is thus able to dictate its competitor’s prices on these products.

The potentialities of abuse through such agreements are well illustrated by the instant case. McKesson’s agreements with the independent wholesalers require the latter, in selling McKesson brand products, to abide by the McKesson wholesale price schedule in force. The schedule specifies a “list” price and also various discounts “off list” ranging in size according to the amount of the retailer’s purchase. Prior to March 21, 1955, the maximum discount authorized by the schedule then in force was “10% and 5% off list,” regardless of the amount of the retailer’s pur-

chase.¹⁹ An independent wholesaler could not grant a larger discount without breaching his agreement with McKesson. This limitation, however, did not apply to direct sales by McKesson's manufacturing division to large retailers considered "desirable accounts" (mostly drug chains such as, *e. g.*, Walgreen's and People's). These retailers received a flat discount of 20% off list on every purchase of \$1,000 or more from the manufacturing division.²⁰

Thus, McKesson's agreements with the independent wholesalers accomplished two purposes. First of all, the agreements served to prevent the independent wholesalers from underselling McKesson's own wholesale divisions. Price competition was destroyed, not only among the independent wholesalers but also with McKesson itself. Secondly, the agreements enabled McKesson's manufacturing division to undersell the independent wholesalers in dealing with the large "desirable accounts." By forbidding the inde-

¹⁹ This maximum discount applied on orders of \$250 or more. On March 21, 1955, after the taking of depositions, McKesson issued a new schedule providing that McKesson's fair trade wholesale prices do not apply on orders of \$1,000 or more (R. 209).

²⁰ Despite the difference in maximum discounts available, some independent wholesalers and some McKesson wholesale divisions have filled single orders from retailers for McKesson brand products amounting to \$1,000 or more, although such instances have been rare (R. 64).

pendent wholesalers to grant discounts larger than 10% and 5% at the same time it was granting a flat 20% discount, McKesson effectively reserved for itself the business of the "desirable accounts." The anomalous result is that "fair trade," ostensibly designed to aid the manufacturer by protecting his good will, has been used by McKesson to enhance its competitive position as a wholesaler. And to the extent that "fair trade" is designed to aid the small retailer, this purpose certainly has not been advanced by McKesson's grant of an extra 5% discount to selected large drug chains. Such use of "fair trade," we believe, is consistent with neither the language nor the aims of the Miller-Tydings and McGuire Acts.

Other economic dangers inhere in the use of "fair trade" agreements by an "integrated" manufacturer (a manufacturer operating its own wholesale or retail outlets). Under a "fair trade" pricing system, a "non-integrated" manufacturer generally sets its resale prices at a level geared to the marketing costs of the independent resale outlet of average efficiency. But an "integrated" manufacturer is likely to fix resale prices primarily in relation to its own outlets, and if these are inefficient the price thus fixed will tend to be higher than if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431.

In addition, the very existence of the price-fix on McKesson products may induce a competing independent wholesaler to handle McKesson brand products rather than purchase similar products from a "non-integrated" manufacturer with whom McKesson is in competition. The value of McKesson brand products to such a wholesaler may be enhanced because of the elimination of competition between the wholesaler and McKesson's wholesale divisions. No such advantage accrues to the independent wholesaler by buying from a "non-integrated" manufacturer. See Note, 50 Nw. U. L. Rev. 78, 86-87.²¹

The danger of such "preference of the competitors for a mutual arrangement for price-fixing, which promises more profit if the parties abandon rather than maintain competition * * *" was pointed out by this Court, in a strikingly similar context, in *United States v. Masonite Corp.*, 316 U. S. 265, 281-282. Masonite, a manufacturer of

²¹ Judge Murphy, in his opinion below (R. 23-24), appears to have recognized these dangers, but held that the Government must make a "factual showing" that the evil actually exists in the particular case. For the reasons stated in the first portion of this brief, and as this Court has repeatedly emphasized, no such "factual showing" is necessary in price-fixing cases; for price-fixing, unless exempt, is illegal *per se*. E. g., *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150. We discuss the economic evils which may flow from "fair trade" agreements between vendors and their competitor-vendees, not to prove "additional restraint" in this case, but to emphasize that the consequences dictated by the language which Congress used are by no means capricious.

a patented hardboard used in the building trade, executed *del credere* "agency agreements" for the sale of its product. The "agents" agreed to abide by the resale prices specified by Masonite. Both "principal" and "agents" maintained selling organizations and, to a large extent, competed in the same markets. Some of the "agents" also manufactured their own brand of hardboard, but, in striking down the scheme, the Court did not differentiate between the "agents" who were only distributors and the "agents" who were manufacturers as well as distributors. Instead, the Court based its decision squarely on the ground that Masonite was fixing the resale prices charged by its competitors. The Court declared (pp. 279-280):

when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee; and that the purpose is to fix prices at which the competitors may market the product, the device is, without more, an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the *del credere* agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity would have. [citing the *Dr. Miles* decision, *supra*]

In the footnote referred to in the last sentence of the quotation, the Court rather plainly implies that the Miller-Tydings Act, because of its proviso, would likewise fail to confer immunity upon a price-fixing agreement between the "principal" and a competing "agent."²²

In any event, even apart from the footnote, the *Mason*²³ decision is persuasive here. In each case, the price-fixing scheme centered on a manufacturer that distributed its products partly through its own selling organization and partly through other distributors. In each case, the manufacturer competed in the same market with the independent distributors. In each case, by means of a series of agreements, the manufacturer fixed the prices at which the independent distributors could resell the product.²³ While it

²² The footnote reads as follows:

"It should be noted in this connection that the Miller-Tydings Act (50 Stat. 693) which amended § 1 of the Sherman Act so as to legalize certain types of resale price agreements expressly excluded 'any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other'."

²³ In each case, also, there existed a seller-buyer relationship between the parties to the agreements. Note McKesson's contention (discussed in the next section of this brief) that the provisos to the Miller-Tydings and McGuire Act have no application to price-fixing agreements between parties having such a relationship.

is true that the manufacturer in *Masonite* sought to uphold its agreements on the basis of patents, whereas McKesson relies on the "fair trade" exemption, the economic evil is precisely the same. And it was on this ground that the agreements in *Masonite* were held invalid. 316 U. S., at 281-282. As this Court concluded (p. 282): "The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*." See also *United States v. United States Gypsum Co.*, 333 U. S. 364, 401.

C. THE EXISTENCE OF A SELLER-BUYER RELATIONSHIP BETWEEN MC KESSON AND THE INDEPENDENT WHOLESALERS IS NOT CONTROLLING SO LONG AS THERE IS ALSO A COMPETITIVE RELATIONSHIP BETWEEN THEM

McKesson agrees, of course, that the provisos "continue * * * the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." *Schwegmann Bros. v. Calvert Corp.*, 341 U. S. 384, 389. Nevertheless, McKesson takes the position that the provisos are completely inapplicable to "fair trade" agreements—that is, agreements between a producer or distributor, on the one hand, and their customers, on the other (Motion to Affirm, p. 4). According to McKesson, the parties to "fair trade" agreements, because of the very nature of the agreements, can never be persons "in competition with each other at the same functional level."²⁴

²⁴ McKesson, in fact, contends that the provisos are aimed solely at agreements "fixing the prices at which *two or more*

The fallacy of this argument is McKesson's unfounded assumption that the two types of agreements—(1) agreements between persons "in competition with each other at the same functional level" and (2) "fair trade" agreements—are mutually exclusive. Stated otherwise, McKesson erroneously assumes that, since it stands in a seller-buyer relationship with the independent wholesalers, it cannot also be in competition with them at the same functional level. As the instant case demonstrates, however, the two categories are overlapping, not distinct.

McKesson makes much of the claim that each of its agreements with the independent whole-

competitive products are to be sold" (Motion to Affirm, p. 6). This contention was not accepted by the court below, which recognized that the provisos might apply to "fair trade" agreements under some circumstances. The contention, moreover, was expressly rejected by the Federal Trade Commission in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 25,291. The Commission stated (p. 35,420) that "We believe Congress also intended to prohibit horizontal price fixing agreements between parties at the same functional level with reference to the *same* trade-marked commodity."

And see *United States v. Masonite Corp.*, 316 U. S. 265, 279-280, where this Court, in a resale price-fixing case involving a single product, indicated the applicability of the Miller-Tydings proviso. This proviso, it should be noted, is worded in the singular; it refers to price-fixing agreements "on *any commodity* referred to in paragraph (2) * * *." [Emphasis added.] See also Senator Humphrey's remarks, 98 Cong. Rec. 8870, stating that the proviso in the McGuire Act applies to an agreement "between wholesalers" on a single product.

salers "faces downward between a manufacturer and a distributor acting in the relationship of producer and reseller of brand merchandise." (Motion to Affirm, p. 5.) But this emphasis on the seller-buyer relationship between the parties completely ignores the competitive relationship also existing between the same parties. McKesson operates at two levels; it not only manufactures its own brand products but also distributes them through its own wholesale divisions. Both operations—manufacturing and wholesaling—are conducted by a single corporation administered by a single president and controlled by a single board of directors.²⁵ For purposes of bookkeeping or internal administration, a corporation can sub-divide itself into as many component divisions as it wishes. It cannot, however, escape civil or criminal liability by the simple device of treating such divisions as independent entities. For the acts of any one of the divisions; the corporation is responsible.²⁶

²⁵ We do not mean to suggest, of course, that a different result would follow merely if McKesson had organized its divisions as separate subsidiary corporations. But here McKesson has not even taken that step.

²⁶ Much the same objection can be made to the decision of the Federal Trade Commission in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 25,291. The Commission, relying in part on Judge Murphy's opinion in the instant case, upheld the validity of "fair trade" agreements between a manufacturer with its own retail stores, on the one hand, and independent retailers engaged in competition with the manu-

More specifically, when McKesson's manufacturing division entered into the 94 agreements challenged here, it did so on behalf of the corporation—not just the manufacturing division. And the corporation, through its wholesale divisions, competes with the independent wholesalers “on the same functional level”—i. e., in selling Mc-

facturer's retail stores, on the other. Although its rationale is not altogether clear, the Commission appears to have adopted the following test (pp. 35,420-1):

“When negotiating the fair trade agreements with retailers was respondent acting *in its capacity as a manufacturer . . . or in its capacity as a retailer?* In other words, it is necessary to study the particular agreement, examine its *form, economic purpose, intent and effect* and then decide whether it is a vertical or horizontal . . . agreement.” [Emphasis added.]

But when a manufacturer-retailer, “acting in its capacity as a manufacturer,” makes a “fair trade” agreement with a competing retailer, it does not thereby stop being a retailer as well as a manufacturer. The competitive relationship exists regardless of what “capacity” the company is acting in at any given moment. Moreover, the criteria enunciated by the Commission—“form, economic purpose, intent and effect”—are precisely the criteria which this Court has held are not material in price-fixing cases. See, e. g., *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 222-223.

In holding the challenged agreements exempt, the Commission overruled its earlier decision to the contrary in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 11,527. See also *Doubleday Doran Co.*, CCH Trade Reg. Ref., par. 11,515. New York state lower courts have likewise expressed conflicting views on the issue. Compare *General Electric Co. v. S. Klein on the Square, Inc.*, 121 N. Y. S. 2d 37, with *Eastman Kodak Co. v. Schwartz*, 133 N. Y. S. 2d 908.

Kesson brand products at wholesale to retailers.²⁷ Indeed, the manufacturing division itself competes "on the same functional level" with the independent wholesalers.²⁸ McKesson's relationship with the independent wholesalers, therefore, is not simply one of seller-buyer but also one of competitor *vis-a-vis* competitor. Unless the substance of the challenged agreements is to be subordinated to the form in which McKesson has cast them,²⁹ this competitive relationship precludes any exemption for the agreements under the Miller-Tydings and McGuire Acts.

²⁷ Moreover, 73 of the 94 challenged agreements relate to sales of McKesson brand products by McKesson wholesale divisions located in the same localities as the purchasing independent wholesalers. As to these 73 agreements, the manufacturing division is not even the seller.

²⁸ As pointed out above, many of the independent wholesalers—including the five not otherwise in competition with McKesson—serve trading areas in which there are located large retailers who make direct purchases from the manufacturing division. These retailers commonly make purchases of McKesson brand products from *both* the manufacturing division and the local wholesalers (either McKesson wholesale divisions or independent wholesalers).

²⁹ "[A]ll the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. . . . [T]he generic designation of the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." *United States v. American Tobacco Co.*, 221 U. S. 106, 180-181. See also *United States v. Masonite Corp.*, 316 U. S. 265, 280.

D. THE LEGISLATIVE HISTORY OF THE MILLER-TYDINGS AND
MC GUIRE ACTS AFFORDS NO BASIS FOR A DIFFERENT CONSTRU-
TION

The court below, as already noted, flatly re-
jected the legislative history of the Miller-Tydings
and McGuire Acts as an index of Congressional
"intent" on the question presented in this case.
Judge Murphy concluded (R. 20):

Examining the legislative history of the
Miller-Tydings and McGuire Acts only con-
firms the observation of Mr. Justice Jack-
son with respect to the former statute: "I
can think of no better example of legisla-
tive history that is unedifying and unil-
luminating than that of the Act before us."
[Concurring in *Schwegmann Bros. v. Cal-
vert Distillers Corp.*, 341 U. S. 384, 397.]

In the *Schwegmann* opinion, Mr. Justice Jackson
added:

Resort to legislative history is only jus-
tified where the face of the Act is inescap-
ably ambiguous, and then I think we should
not go beyond Committee reports, which
presumably are well considered and care-
fully prepared * * * to select casual state-
ments from floor debates, not always dis-
tinguished for candor or accuracy, as a
basis for making up our minds what law
Congress intended to enact is to substitute
ourselves for the Congress in one of its
important functions. * * * It is the busi-
ness of Congress to sum up its own debates
in its legislation. * * *

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. * * * To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country. [341 U. S. 384, 395-397.]

Both Mr. Justice Jackson in *Schwegmann* and Judge Murphy in the opinion below expressed their assent to Mr. Justice Holmes' admonition: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *Collected Legal Papers*, p. 207.

Whatever may be the merit of this admonition as a general matter (compare *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479), the legislative history of the Miller-Tydings and McGuire Acts provides no justification for the construction urged here by McKesson. The committee reports, as Judge Murphy noted (R. 21), "are replete with condemnation of 'horizontal' and approbation of 'vertical' fair trade agreements," but do not "come to grips with the instant problem, squarely and unequivocally." The same is true of statements by individual legislators who either introduced the bills or served on committees that had considered the provision in question. With respect to statements by other individual legislators, at best they are inconclusive. Compare *Brown v. Board of Education*, 347 U. S. 483, 489. Under these circumstances, the cus-

tomary usage of the language to be construed becomes of decisive importance.³⁰ See *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488; 493-494.

1. *The Miller-Tydings Act*

The Miller-Tydings bill originated in the 74th Congress. The bill (S. 3822) was reported out by the Senate Judiciary Committee (S. Rep. 2053, 74th Cong., 2d sess.) and was passed by the Senate (80 Cong. Rec. 8433) but was not reported out of committee in the House. In the 75th Congress, the bill (S. 100, 81 Cong. Rec. 66; H. R. 1611, 81 Cong. Rec. 34) was reported out by the judiciary committee of each house (S. Rep. 257 and H. Rep. 382, 75th Cong., 1st sess.) but was not debated or acted upon. Finally, the bill was attached by the Senate Committee on the District of Columbia (S. Rep. 879, 75th Cong., 1st sess.) as a rider to a District of Columbia revenue bill (H. R. 7472). Not until the bill

³⁰ In this respect, this is an even more appropriate case than *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, for construing a statute according to the customary usage of the language. In *Schwegmann*, the Court adopted such a construction of the Miller-Tydings Act despite some contrary evidence in committee reports and despite a contrary interpretation by some federal officials at the time the Miller-Tydings Act was passed. See dissenting opinion, 341 U. S. at 401-402. In the instant case, none of these obstacles is present to block a construction based on the ordinary meaning of the provisos. Here, in short, there is no reason to think that Congress was using "a private code" when it enacted the provisos into law. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 543-544.

reached the Senate floor was the proviso—denying an exemption to agreements (among others) “between wholesalers” and “between persons, firms, or corporations in competition with each other”—added to the bill. In this form it was debated and passed by the Senate (81 Cong. Rec. 7486-7487, 7488-7497) and approved by the House on recommendation of the House conferees (81 Cong. Rec. 8137-8143).

Senate Report 2053 in the 74th Congress, recommending enactment of S. 3822, read in part as follows (p. 2):

The State acts are in no sense general price-fixing acts. They merely authorize a manufacturer or producer to enter into contracts for the maintenance of his price, but they do not compel him to do so. In other words, they are merely permissive.

They do not authorize horizontal contracts, that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity. [Emphasis added.]

This language was quoted in Senate Reports 257 and 879 in the 75th Congress, recommending enactment of S. 100 and H. R. 7472, respectively. No other reference to the effect of the proposed exemption on “horizontal” agreements appears in the three Senate reports. And in the single House report, No. 382 in the 75th

Congress, no reference whatever is made to the subject. The absence of any significant discussion in the four reports is hardly surprising in view of the fact that the proviso was not added until after their submission.

The proviso was first proposed by Senator Tydings on July 6, 1937, the same day on which the Senate Committee on the District of Columbia had submitted its report on H. R. 7472. In part, the language of the proviso was apparently taken from the state acts, which generally exclude "any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."³¹ The federal legislation, however, excludes not only agreements "between producers or between wholesalers * * * or between retailers" as the state acts do, but also excludes agreements "between manufacturers * * * or between brokers or between factors * * * or between persons, firms, or corporations in competition with each other." These latter categories appear in none of the state acts.

At the outset of the debate on the rider, Senator Tydings stated (81 Cong. Rec. 7487) that the amendment was offered "in order that there may be no misunderstanding and that the element of competition may be kept forward

³¹ Report of the Federal Trade Commission on *Resale Price Maintenance* (1945), pp. 80-81.

throughout the process projected in this measure * * *." [Emphasis added.]³² Later the following colloquy occurred (81 Cong. Rec. 7496):

Mr. SCHWELLENBACH. Will the Senator explain just what the amendment does as compared to what is printed in the bill?

Mr. TYDINGS. Originally, as the Senator from Washington will recall, there was a message from the administration in opposition of this measure. I may say that I have been in consultation with the Attorney General's office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration * * *.

At the conclusion of the debate,³³ the amendment to the rider and then the rider itself were passed by the Senate. 81 Cong. Rec. 7497.

³² In a similar vein Senator Tydings emphasized (81 Cong. Rec. 7495) that "There is not a line in the [rider] which would permit manufacturers to combine with other manufacturers, wholesalers with other wholesalers, or retailers with other retailers."

³³ Perhaps the most apt characterization of the Senate debate was Senator Vandenberg's comment (81 Cong. Rec. 7492): "Regardless of the merits of this [rider], it is perfectly obvious that not 5 percent of the membership of the Senate will know anything whatever about the [rider] when the Senate votes upon it. It is perfectly obvious that the Senate has reached the point of exhaustion in respect of the consideration of legislation; and if the Senate has any prudent consideration whatever for the country, instead of trying to do some of these intricate things it will quit and go home."

The House debate on the bill is scarcely more conclusive. Because of House objections to the rider, the bill was referred to a conference committee composed of members of both the House and the Senate. The committee recommended that the House recede from its objections. 81 Cong. Rec. 8137. In explaining to the House why the House conferees had agreed not to oppose the rider, Representative Dirksen, a member of the committee, had only this to say of the proviso (81 Cong. Rec. 8138): "Then came the District revenue bill and this Tydings-Miller bill was attached as a rider. It was slightly modified from its original text by a proviso which I am informed was acceptable to the Attorney General and acceptable to the authors." During the discussion that followed, 81 Cong. Rec. 8139-8143, there were no other comments on the matter by any other member of the conference committee or by Representative Miller, the author of H. R. 1611. The conference committee's report was thereupon approved. 81 Cong. Rec. 8143.

Representative McLaughlin, it is true, briefly alluded to the effect of the proviso added in the Senate.³⁴ He declared, in the course of a rather

³⁴ 81 Cong. Rec. 8141:

"* * * The act, as amended in the Senate, and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity covered by the act, between manufacturers, or between producers, or between wholesalers,

lengthy statement, the obvious truth that price-fixing agreements between manufacturers (or sellers) of *different* trade-marked articles would continue to be illegal because of the proviso. Relying on this statement, McKesson urged below (albeit unsuccessfully) that the provisos apply exclusively to such agreements.²⁵ But any such inference from the McLaughlin statement is at most a very dubious one. Representative McLaughlin may well have intended his explanation to be merely illustrative of the scope of the proviso, not necessarily all-inclusive; we note that he himself used the qualifying language "as an example."

And, in any event, although Representative McLaughlin was a member of the House Judiciary Committee which had considered H. R.

or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. *As an example, the act would not allow two manufacturers of similar trade-marked articles, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold.* The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—contracts known as horizontal contracts." (Emphasis added.)

²⁵ See footnote 24, *supra*. This construction was also rejected by the Federal Trade Commission in the *Eastman Kodak* decision, notwithstanding full consideration of the McLaughlin statement.

1611, the proviso was never a part of that bill. As already stated, it was proposed on the Senate floor long after the House Judiciary Committee's consideration of H. R. 1611. On this matter, therefore, Representative McLaughlin spoke only as an individual legislator and not as a draftsman or sponsor.³⁶ "The peril of resorting to individual constructions of legislators," as the court below pointed out (R. 21), "is not merely that the mandate of the statute would cease to be embodied in its language and become unavailable as warning to the nation at large. It is also that such views may be no more than individual ones."³⁷

³⁶ The inconclusive nature of the McLaughlin statement was expressly recognized in the Court's opinion in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384. Representative McLaughlin is the "one Congressman in the debate [who] said that the nonsigner provision of state laws was validated by the federal law." *Id.* at 393. But the Court found that, under the circumstances, "we do not take these remarks at face value." *Ibid.* The McLaughlin statement is entitled to even less weight in the instant case since, on the question presented here, his remarks are considerably more ambiguous.

³⁷ See also, *e. g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318: "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other." The latter half of this criticism of undue reliance on individual statements may be applicable here. McKesson relies on the McLaughlin statement as evidence that Congress restricted the provisos exclusively to agreements covering two or more competing products. McKesson also relies on a statement by Senator Humphrey during the debate on the McGuire Act, 98 Cong. Rec. 8870. Yet the Humphrey statement makes clear that the provisos apply to agreements between wholesalers on a *single* product.

2. The McGuire Act

The McGuire Act, like the Miller-Tydings Act, denied an exempt status to resale price-fixing agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." Because of the identical language used in the two provisos, and in the absence of any evidence to the contrary, it would seem apparent that the McGuire Act is to that extent only a reenactment of the Miller-Tydings Act. The legislative history of the McGuire Act proviso, therefore, is probably entitled to even less weight than that of the Miller-Tydings Act proviso.

The McGuire bill (H. R. 5767) was introduced in the 82d Congress. Undoubtedly its main purpose was to legalize "non-signer" clauses in state "fair trade" acts and thus modify the rule of the *Schwegmann* decision. See remarks of Representative McGuire on offering the bill, 97 Cong. Rec. 13404-13405. Concerning the proviso, in the same form then as at present, he only said: "The bill specifically forbids agreements between manufacturers, or between wholesalers, or between retailers, or between 'persons, firms or corporations in competition with each other.'" The bill was referred to the House Interstate and Foreign Commerce Committee, which recommended enactment.

With respect to the proviso, the Committee's report (H. Rep. 1437, 82d Cong., 2d sess., p. 6) states: "This paragraph contains substantially the same provisions as those inserted in the Sherman Act by the second proviso of the Miller-Tydings Act."³⁸

During the same session, a somewhat similar bill (H. R. 6925) was introduced by Representative Keogh and was referred to the House Committee on the Judiciary.³⁹ This bill, like the McGuire bill, contained a proviso substantially identical to the proviso in the Miller-Tydings Act. In the Committee's report recommending enactment (H. Rep. 1516, 82d Cong., 2d sess., p. 18), only this was said of the proviso: "Subsection (f) specifically prevents contracts and agreements *between competitors*, so-called 'hori-

³⁸ With respect to paragraph (2), the report (pp. 5-6) states that the paragraph "contains substantially the same provisions" as the first part of the Miller-Tydings Act. The first exception added a provision expressly covering an agreement which prescribed a stipulated price. The second exception added a provision expressly covering an agreement which requires a vendee to enter into another contract prescribing a resale price.

³⁹ The principal differences between the two bills were these: the Keogh bill authorized only the fixing of minimum resale prices, while the McGuire bill authorized the fixing of stipulated as well as minimum resale prices; and the Keogh bill declared price-cutting in violation of state "fair trade" acts to be an act of unfair competition under federal law, while the McGuire bill left the matter to the States for enforcement.

zontal' agreements between producers or distributors on the same level of commerce." (Emphasis added.) The bill was brought up on the House floor at the same time as the McGuire bill.

The House debate on the two bills (98 Cong. Rec. 4896-4926, 4933-4956) throws little light on the question presented here. There were, of course, general statements to the effect that the bills would not permit "horizontal" price-fixing. See, *e. g.*, remarks of Representative Madden (*id.* at 4896) and Representative Dolliver (*id.* at 4902). According to Representative Patman, the bills would not permit "horizontal price fixing, that is, *any getting together of competitors who agree not to compete on price.*" [Emphasis added.] ⁴⁰ And two Congressmen stated that collusion between competing sellers would not be exempt under the bills if enacted. See remarks of Representative Hill (98 Cong. Rec. 4907) and Representative McKinnon (98 Cong. Rec. 4955). After the debate, the McGuire bill was passed by the House and sent to the Senate. (98 Cong. Rec. 4956.)

⁴⁰ Mr. Patman also stated (98 Cong. Rec. 4951): "*Horizontal price fixing is essentially an agreement among those who are on the same level in the distributive process, be they manufacturers or distributors, not to compete. Vertical resale price maintenance takes place between a manufacturer and his distributors, who are not on the same level in the distributive process and thus, of course, are not competitors.*" [Emphasis added.]

In the Senate, the bill was referred to the Senate Committee on Interstate and Foreign Commerce. Hearings on the bill were held on June 2, 1952, six days after the well-publicized filing of the Government's complaint in the instant case.⁴¹ The Committee's report (S. Rep. 1741, 82d Cong., 2d sess.) reported the bill back to the Senate without, however, expressing approval or disapproval and without any committee comments.

During the ensuing debate on the Senate floor (98 Cong. Rec. 8716-8748, 8819-8858, 8865-8873, 8881-8890, 8891-8892), the only reference to the proviso appeared in remarks by Senator Humphrey in a brief colloquy with Senator Spark-

⁴¹ Hearings before Senate Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d Session. The first witness was the Assistant Attorney General in charge of the Antitrust Division. In the course of his statement, he made reference to the *McKesson* case and sketched the nature of the charges in the Government's complaint. *Id.* at 17.

Other witnesses included the President of the American Fair Trade Council, a principal proponent of the legislation. In his statement he said (*id.* at 137) :

"Horizontal price fixing is the fixing of prices by parties normally in competition with each other * * *"

"* * * Under vertical price maintenance minimum prices are established by contract between parties who do not compete with each other * * *"

See also the similar statement of the Legal Counsel for the National Association of Retail Druggists (*id.* at 225).

man.⁴² These remarks took place on July 2, 1952, more than a month after the complaint in the

⁴² 98 Cong. Rec. 8870:

"* * * If, for example, when a producer, who sells to distributors, wholesalers, retailers, and consumers, makes a resale price-maintenance agreement relative to a commodity made by him and bearing a trade-mark or brand, with a distributor, wholesaler, or retailer who resells such commodity at either the wholesale, or retail level, there exists a vertical resale price-maintenance contract which would be lawful under the bill if the requirements of paragraph (2) are met.

"On the other hand, if one wholesaler enters into a resale price-maintenance agreement with another wholesaler prescribing the price at which they both sell a trade-marked or branded commodity which they both buy from the producer, that agreement would be horizontal and would not be made lawful.

"In other words, wholesalers getting together on a price are acting illegally." For a manufacturer to get together with other manufacturers to maintain prices is illegal, but for a manufacturer to say that a certain product will sell at a certain price from the manufacturer down to the retailer is legal under the limitations prescribed in paragraph (2) of section 5 (a) of the Federal Trade Commission Act.

"In general, the test of whether a resale price-maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price-maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved. It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and

instant case had been filed. Senator Humphrey, it should be noted, was not a member of any committee that had considered the bill. After the debate, the bill was passed by the Senate and sent to the President for his signature. 98 Cong. Rec. 8892.

McKesson places heavy reliance on the Humphrey statement (Motion to Affirm, p. 6), even though the statement flatly rejects McKesson's argument that the provisos apply only to agreements covering *different* trade-marked articles. Notwithstanding this variance between McKesson's construction of the proviso and the Humphrey statement, McKesson contends that the statement is controlling on the specific question presented here. This contention, we believe, cannot be accepted.⁴³ As already noted, Senator Humphrey was not a member of any committee which had considered the bill; thus he spoke only in an individual capacity and his views, as the court below pointed out. (R. 21) in refusing to

retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers." [Emphasis added.]

⁴³ In addition to the other reasons set forth above, it is not entirely clear from the Humphrey statement that he meant his remarks to apply even in a situation where the manufacturer-wholesaler and the independent wholesalers are engaged in competition with each other. His discussion appears to relate solely to the "between wholesalers" phrase to the exclusion of the "corporations in competition" phrase.

follow the Humphrey statement, "may be no more than individual ones." While it is undoubtedly true that Senator Humphrey was one of the most vigorous proponents of the McGuire Act in the Senate, there may be, and often is, a disparity between the hopes of the supporters of legislation and the statute finally enacted. See *United States v. New York Central R. Co.*, 263 U. S. 603, 610.

Moreover, Senator Humphrey was speaking with respect to the meaning of a bill which had originated in the House rather than the Senate and had already been passed by the House. When the House enacted the McGuire bill, it did not also thereby place its stamp of approval on any interpretation that might subsequently be put on the bill by a single Senator. There is no evidence indicating that anyone in the House (or, for that matter, anyone in the Senate, except possibly Senator Sparkman) concurred in Senator Humphrey's views on the question presented here. Indeed, numerous statements condemning "horizontal" price-fixing between competitors (see, e. g., Representative Patman's statement 98 Cong. Rec. 4951, *supra*) appear to run in the contrary direction.

In short, the legislative history fails to show that either Congress as a whole or any of the appropriate committees had formulated any "legislative intent" on the specific question here presented. What it does show, however, is Con-

gressional insistence that the legislation should not be used to sanction any "horizontal" price-fixing agreements between competitors. It certainly affords no support for McKesson's attempt to broaden the exemption beyond the ordinary meaning of the language to immunize from the Sherman Act "fair trade" agreements between a manufacturer-wholesaler and independent wholesalers with whom it competes.

E. CONTRARY TO MCKESSON'S ASSERTION, THE CONSTRUCTION URGED HERE WOULD NOT DESTROY THE "FAIR TRADE" EXEMPTION

McKesson urges, however, that a construction of the provisos based on the common usage of the language "would result in the grant of the power to fair trade being substantially swallowed up by the exceptions, and would [thus] completely frustrate the intent of Congress." (Motion to Affirm, p. 7.) Such fears, to say the least, are considerably exaggerated.

At the outset, it should be noted that the only price-fixing agreements in controversy are those between McKesson and the independent wholesalers. McKesson is in error in imputing to the Government the "bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler in the distribution of his own products * * *." (Motion to Affirm, p. 3.) The

Government makes no such contention. Except in those states where "fair trade" is not permitted, drug retailers are bound, either by contract or nonsigner provisions, to sell McKesson products only at the prices fixed by McKesson. Such use of "fair trade" is not challenged here. These retailers, unlike the independent wholesalers, are not engaged in competition with McKesson. And cancellation of McKesson's agreements with the independent wholesalers will not relieve these retailers of the obligation under state "fair trade" laws to abide by McKesson's retail price schedule.

Nor does McKesson offer any convincing evidence in support of its contention that "[t]o hold with the Government * * * would be to exclude from the statutes all but a small segment of the producers of competitive brand named merchandise and to limit fair trade to the unusual case." (Motion to Affirm, p. 3.) McKesson merely points to statistics showing that "22% of all manufactured goods is wholesaled through outlets owned or operated by the manufacturers as compared with only 25% through independent wholesalers." (Motion to Affirm, p. 7.) But

* One qualification should be noted. Conceivably the district court, for the purpose of dissipating the effects of the charged antitrust violation, might find it necessary to order a temporary suspension of McKesson's whole price-fixing program.

these statistics are completely meaningless on the question presented here. First of all, these statistics relate to manufactured goods generally and not just "fair trade" products. Second, these statistics do not reveal the percentage of manufacturers that (like McKesson) sell *both* through their own wholesale outlets and through independent wholesalers. Third, these statistics give no indication of the percentage of such manufacturers whose own wholesale outlets are *in competition* with the independent wholesalers. Only manufacturers of this type will be affected by the decision in the instant case, and even then only to the extent that they enter into "fair trade" agreements with the competing independent wholesalers. Unaffected will be all other "fair trade" agreements, as well as a manufacturer's right to relief against "non-signers."

Far from destroying "fair trade," the Government's construction of the provisos will only insure that "fair trade" is not used as a cover for price-fixing between competitors.

CONCLUSION

The judgment of the district court should be reversed and the cause remanded for entry of an appropriate decree.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General,

STANLEY N. BARNES,
Assistant Attorney General,

RALPH S. SPRITZER,
Assistant to the Solicitor General.

MARCH 1956.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
371 L. 10 23
APR 13 1956
HAROLD B. WILEY, Clerk

No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON AND ROBBINS, INC.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

REPLY BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,

Solicitor General,

STANLEY N. BARNES,

Assistant Attorney General,

RALPH S. SPRITZER,

Assistant to the Solicitor General,

Department of Justice, Washington 25, D. C.

CITATIONS

Cases:

Page

General Electric Co. v. S. Klein on the Square, Inc.,
121 N. Y. S. 2d 37 -----

7

McCaughn v. Hershey Chocolate Co., 283 U. S.
488 -----

5

United States v. Wrightwood Dairy Co., 315 U. S.
110 -----

5

Miscellaneous:

Hearings before the Antitrust Subcommittee of
the House Judiciary Committee on Resale
Price Maintenance, 82d Cong., 2d sess., p. 336
et seq -----

7

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 448

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON AND ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

1. McKesson's brief is principally devoted to a restatement of its thesis that the Miller-Tydings and McGuire provisos (denying protection to resale price-fixing agreements "between wholesalers" and "between persons, firms, or corporations in competition with each other") merely limit the "fair trade" exemption to resale price-fixing agreements between parties having a seller-buyer relationship. Since a seller-buyer relationship is, of course, involved in every "fair trade" agreement, the effect of adopting McKesson's construction would be to render the provisos inapplicable to any and all "fair trade" agreements, even where the parties to such an agreement (as in the instant case) are "wholesalers" and "per-

sons, firms, or corporations in competition with each other" in the ordinary sense of those terms. As more fully argued in the Government's main brief, McKesson's construction strains—indeed, disregards—the language of the provisos (pp. 38–41); permits the evil of "horizontal" price-fixing agreements (pp. 41–48); and ignores important competitive relationships that may also exist between seller and buyer of the "fair traded" commodity (pp. 48–53). No further discussion of these issues appears necessary in the present brief.

2. One important change in McKesson's construction of the provisos, however, should be noted here.

In its briefs to the district court and in its motion to affirm filed in this Court, McKesson urged that the provisos apply only to agreements "between manufacturers of competing products, or between wholesalers of competing products, or retailers of such products, fixing the prices at which *two or more* competitive products are to be sold" (motion to affirm, pp. 5–6, italics in original).¹ But in its brief on the merits in this Court, McKesson takes quite a different view.

¹ Such agreements, it was stated, "are not protected because they destroy brand versus brand competition" (motion to affirm, p. 6). For discussion of McKesson's contention that the provisos apply only to agreements involving two or more competing products, see Government brief, pp. 48–49, 60, 67.

McKesson now states that the provisos also deny an exemption to "contracts made *between wholesalers of the same product* not produced by any of them" (McKesson brief, p. 6, italics added). Stated otherwise, McKesson takes the position that the provisos apply to an agreement between two competing independent wholesalers fixing the price of a McKesson brand product but that the provisos do *not* apply to a similar price-fixing agreement between McKesson and a competing independent wholesaler. Under McKesson's present view, what would be concededly illegal if done between two independent wholesalers becomes legal if done between an independent wholesaler and a wholesaler who is also a manufacturer.

This change in McKesson's position not only narrows the area of disagreement between the parties but also dramatizes McKesson's insistence that its role as a manufacturer is dispositive of the case. For the reasons stated in the Government's brief (pp. 50-52), McKesson's role *as a wholesaler* and *as a competitor* of other wholesalers cannot be so easily glossed over. McKesson is, of course, the largest drug wholesaler in the country. And, in the course of its wholesaling business, McKesson competes with each of the 94 independent wholesalers with whom it has executed "fair trade" agreements. More-

over, the provisos do not distinguish between various operating divisions of companies engaged in price-fixing. For example, the provisos expressly continue Sherman Act prohibitions against resale price-fixing agreements "between persons, firms, or corporations in competition with each other." [Italics added.] Unless these words are to be denied their customary meaning, it is immaterial whether McKesson entered into the challenged agreements as a manufacturer or as a wholesaler; it is sufficient that McKesson competes as a wholesaler with each of the 94 independent wholesalers involved.

3. The area of disagreement between the parties has also been narrowed by McKesson's apparent abandonment of the district court's rationale. The district court, although finding the legislative history of the Miller-Tydings and McGuire Acts to be "unedifying and unilluminating" on the question presented here, concluded that the *per se* doctrine need not be applied "in fair trade situations" and that the challenged agreements are valid in the absence of a showing of "some additional restraint." McKesson turns the district court's rationale upside down; without making any attempt whatever to defend the district court's holding with respect to the *per se* doctrine, McKesson places primary reliance on two isolated statements from the legislative history of the

two Acts.² As a consequence, there would appear to be no further controversy between the parties on the proposition that the *per se* rule applies unless McKesson comes within the terms of the exemption (see Government's main brief, pp. 25-35).

4. McKesson has also chosen to ignore the fact pointed out by the Government (pp. 69-70) that cancellation of the 94 challenged agreements will not curtail McKesson's "fair trade" practices in relation to retailers. Nevertheless, McKesson (p. 23) repeats its dire warning that "the interpretation of the statutes now being urged by the appellant would soon result in the grant of the power to 'fair trade' being substantially swallowed up by the exceptions. . . ."

In support of this statement, McKesson (pp. 19-20) quotes at length from the 1948 U. S. Census of Business. But the statistics there set

² The pertinent legislative history is set forth, in considerable detail and in its context, at pp. 53-69 of the Government's main brief. And see *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494:

"Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co. v. Deering*, 254 U. S. 443, 474; *Lapina v. Williams*, 232 U. S. 78, 90; *United States v. Freight Assn.*, 166 U. S. 290, 318."

See also *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125.

forth are completely meaningless on the question presented here. The statistics merely show that a great many manufacturers operate their own wholesale selling organizations. This is doubtless true and we have never questioned it. It does not follow, however, that the distribution practices of all such manufacturers (or even a small percentage of them) would be affected by a reversal of the decision below. Such a manufacturer would be affected only if three additional circumstances are present: (1) if he distributes his product through independent wholesalers as well as through his own selling organization; (2) if such independent wholesalers are engaged in competition with the manufacturer's selling organization; and (3) if (and only to the extent that) the manufacturer uses "fair trade" agreements with such independent wholesalers to fix resale prices.³ See Government's main brief, pp. 70-71. The census data quoted by McKesson gives no information as to any of these three factors.

McKesson (p. 19) also relies on a survey made by the American Fair Trade Council "of known fair trading manufacturers." This survey purports to show that an overwhelming percentage of "all such manufacturers who responded to inquiries" distributed their products through independent wholesalers as well as through their own wholesale outlets. While this survey at least

³ Even then, as already noted, he would not be prevented from fixing the prices to be charged by retailers.

takes some cognizance of the factors just noted, it is subject to some of the same criticisms made above, as well as others. The survey does not indicate whether the "known fair trading manufacturers" who were sent inquiries even use "fair trade" agreements at the wholesale level; certainly not all manufacturers who "fair trade" at the retail level also "fair trade" at the wholesale level.⁴ The survey also fails to indicate how many manufacturers "responded to inquiries"; absent such information, one can only speculate as to the representative nature of the sample used for the survey. The survey, moreover, does not indicate whether there is any competition between independent wholesalers and the wholesale outlets of manufacturers who sell through both channels; yet, it is only where such competition exists that the Government is attacking the legality of "fair trade" agreements between a manufacturer-wholesaler and independent wholesalers.

It should be noted, additionally, that the American Fair Trade Council can hardly be regarded as an impartial agency in this matter. The Council, as its name implies, is an association of manufacturers who have joined together to promote and defend the cause of "fair trade."⁵ In-

⁴ See, e. g., *General Electric Co. v. S. Klein on the Square, Inc.*, 121 N. Y. S. 2d 37, 56 (General Electric).

⁵ See Hearings before the Antitrust Subcommittee of the House Judiciary Committee on Resale Price Maintenance, 82d Cong., 2d sess., p. 336 *et seq.*

deed, the Council's report of the survey (reproduced at R. 15) shows that the survey was made because of the Government's filing of this and similar cases.

In short, although the case undoubtedly has some significance for some other companies, there is no support for McKesson's statement that the Government's position results in "the grant of power to 'fair trade' being substantially swallowed up by the exceptions." As pointed out in the Government's main brief (p. 71), the Government's construction of the provisos, far from destroying "fair trade," will only insure that "fair trade" is not used as a cover for price-fixing between competitors.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STANLEY N. BARNES,
Assistant Attorney General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

APRIL 1956.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
NOV 9 1955
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955.

No. 448.

UNITED STATES OF AMERICA,

Appellant,

McKESSON & ROBBINS, INCORPORATED,

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

JOHN P. McGRATH,

20 Pine Street,

New York 5, N. Y.

Counsel for Appellee.

HODGES, REAVIS, McGRATH, PANTALEONI
& DOWNEY,

LAURENCE C. EHRHARDT,

MARLAND GALE,

ROBERT THRUX,

DENIS B. SULLIVAN,

Of Counsel.

INDEX.

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4

CITATIONS

Cases:

<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U. S. 384	4
<i>United States v. Bausch & Lomb Co.</i> , 321 U. S. 707	4
<i>Eastman Kodak Co.</i> , 3 GCH Trade Reg. Rep. (10th Ed.) par. 25,291	7
<i>United States v. Jackson</i> , 280 U. S. 183	9

Statutes:

Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1 (Sherman Act)	2
Act of August 17, 1937, 50 Stat. 693 (Miller- "dings Act)	2, 4
Act of July 14, 1952, 66 Stat. 632 (McGuire Act)	2, 3, 4, 7, 8

Miscellaneous:

98 Congressional Record 8870	6
Maynard and Beckman, <i>Principles of Marketing</i> . Fifth Edition, 1952	7

IN THE
Supreme Court of the United States

OCTOBER TERM 1955

No. 448.

UNITED STATES OF AMERICA,

Appellant,

v.

McKesson & Robbins, Incorporated,

Appellee.

*ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

MOTION TO AFFIRM.

• McKesson & Robbins, Incorporated ("McKesson"), the appellee, hereby moves under Revised Rule 16(c) to affirm the judgment appealed from on the ground that the question presented is so unsubstantial as not to need further argument.

Statement.

The appeal involves only the right of McKesson as a manufacturer of brand named drug products to fair trade protection on such products, which are distributed in fair and open competition with similar brand named merchandise sold by competing manufacturers. The McKesson products are "fair traded" in states where this is lawful

under the authority of the Sherman Act,¹ as amended by the Miller-Tydings Act,² and under the McGuire Act.³

Like most manufacturers in the United States, McKesson does not follow any single method of distributing its brand named products. By far the major portion is sold to retailers through McKesson's own 74 wholesale divisions. These divisions sell a complete line of drug store products, of which McKesson items are only a small part. McKesson brand named merchandise is also sold by the manufacturing division directly to some retailers, largely chain stores and other volume purchasers.

A small amount of McKesson's brand named products is also sold by the manufacturing division to other wholesalers, but only \$283,462 out of annual sales of \$11,000,000 were so made to wholesalers whose trading areas materially overlapped those of McKesson's wholesale divisions.⁴

Fair trading of McKesson brand named merchandise is carried out in the usual way through minimum resale price contracts which are made by McKesson as a manufacturer with (a) wholesalers and (b) retailers. These fair trade contracts run vertically—that is downward following the course of the product from McKesson as a manufacturer to wholesaler to retailer.

McKesson, like other manufacturers who produce and sell brand named merchandise, has been marketing and fair trading in this general manner since shortly after the enactment of the Miller-Tydings Act over eighteen years ago.

¹ Act of July 2, 1890, 26 Stat. 209, 15 USC 1.

² Act of August 17, 1937, 50 Stat. 693.

³ Act of July 14, 1952, 66 Stat. 632.

⁴ The sales reported were made in the fiscal year ending June 30, 1952. McKesson wholesale divisions also made "courtesy sales" of McKesson brand named products in small amounts to other wholesalers who either carry only minimum stocks or do not stock McKesson products to enable them to fill orders. Those sales aggregated only \$200,000 in that year for all 74 wholesale divisions.

Summary of Argument.

It is the Government's bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler in the distribution of his own products, even though the products are sold in open competition with the competing brands of others.¹

This contention, we believe, is manifestly unsubstantial, both as a general proposition of law and as applied to the particular facts of this case.

As a general proposition the argument depends on farrow verbalism. It ignores economic realities and imputes a similar disregard to Congress. In fact, as the Federal Trade Commission has recently demonstrated with a wealth of documentary evidence, few manufacturers who sell in interstate commerce exclude themselves from the processes of distribution; most of them are also wholesalers or retailers, or both. Congress knew this when it passed the fair trade legislation.² To hold with the Government, therefore, would be to exclude from the statutes all but a small segment of the producers of competitive brand named merchandise and to limit fair trade to the unusual case. The exception would thus absorb the rule.

On the specific record in this case, there was shown to be no substantial competition on the same functional level between McKesson and any of the parties with whom it

¹ This is the Government's vestigial claim on a complaint which was served before passage of the McGuire Act and was largely rendered moot by that Act.

² The intended application of the statutes was so clear that despite the widespread practice of manufacturers to engage in distribution activities at all levels, the Justice Department did not even suggest for fifteen years that such a manufacturer would be excluded from the protection of the statutes.

has made fair trade contracts. This fact alone justified dismissal of the complaint in the district court. In our view, therefore, this particular record does not present an adequate occasion for this Court to consider and determine questions having such possible far-reaching economic and social consequences.

Argument.

The decision of the District Court is clearly correct. There is no sound reason, economic or otherwise, to deny to a manufacturer the right to fair trade its brand named products at the wholesale level simply because it distributes such products through its own wholesale outlets as well as through independent wholesalers, while at the same time permitting that right to a manufacturer of competing brand named products who distributes entirely through independent wholesalers. Neither the Miller-Tydings Act nor the McGuire Act was intended so to differentiate between manufacturers. The almost identical language of both statutes upon which appellant rests its entire case, when read in context with the whole of such statutes, evidences a plain intention to prohibit contracts of a horizontal nature only when made between persons "in competition with each other at the same functional level,"¹ not fair trade contracts of the vertical type "between a producer or distributor, on the one hand, and their customers on the other."²

1. Two fundamental principles of fair trade demonstrate that the appellant's case is without substance. The

¹ Cf., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 389.

² Cf., *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724.

first is that under all fair trade statutes no manufacturer is entitled to "fair trade" his own brand products unless they are sold in free, fair and open competition with similar brand products manufactured by others. The second principle is that fair trading is legalized price fixing, when so confined to competitive brand named products of a single manufacturer. Such price fixing necessarily results in the elimination of price competition among the outlets of one manufacturer's products on down the line of distribution, usually to the ultimate consumer. No different economic effect results when the manufacturer is also at times a distributor.

Thus the fair trade statutes rely on *brand versus brand competition* in the marketing of similar products of competing manufacturers to keep the resale prices competitive and at reasonable levels. They do not at all depend on price competition among the marketing outlets of a single manufacturer. The manufacturer, so long as he competes with other manufacturers, may eliminate price competition among his selected outlets—whether they be his own or independent.

So long as brand versus brand competition exists among products of competing manufacturers, consumer acceptance is obtained by quality of product and price advantage. Integration of manufacturing and wholesaling activities will not induce consumer acceptance of a less attractive or more expensive brand.

2. The fair trade contracts involved here are precisely the vertical type permitted by the statutes. Each faces downward between a manufacturer and a distributor acting in the relationship of producer and reseller of brand merchandise. They are to be distinguished from the illegal, horizontal type of agreement between manufacturers of

competing products, or between wholesalers of competing products, or retailers of such products, fixing the prices at which *two or more* competitive products are to be sold. These latter contracts, which are extrinsic to the vertical process of marketing a single product are not protected because they destroy brand versus brand competition.¹

The obvious fallacy in the doctrinaire assertions on page 10 of the Jurisdictional Statement is that they ignore this requirement that there be competition among brands. For every manufacturer of a competitive product, whether or not he is also a wholesaler, must meet the price competition of manufacturers of similar competitive products, regardless of the degree of efficiency of his wholesale outlets or what his profit-making pattern might be. No manufacturer, integrated or not, of a competitive brand product can afford to fix an arbitrary high price for his product. If he did so he would price himself out of the market.

¹ As Senator Humphrey, the leading proponent in the Senate of the McGuire Act, said in the debate on that act (98 Cong. Rec. 8870):

"In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers."

7
Despite full opportunity to present facts showing an additional restraint, the appellant at the trial of this case neither proved nor produced evidence to prove that integration resulted in higher prices to the retailer or to the consumer.

3. The interpretation of the statutes urged by the appellee would result in the grant of the power to fair trade being substantially swallowed up by the exceptions, and would completely frustrate the intent of Congress. We find, for example, that a study of the Censuses of Business by Professors Maynard and Beckman of Ohio State University¹ reveals that 22% of all manufactured goods is wholesaled through outlets owned or operated by the manufacturers as compared with only 25% through independent wholesalers. The other 53% represents direct sales to industrial and other large users, to retailers, both manufacturer operated and independently owned, to consumers, and to others than wholesalers.

The Federal Trade Commission similarly found that

“... the practice of selling exclusively through ‘regular channels’ of distribution is almost becoming the exception rather than the rule. Sound business or economic reasons may justify such methods of distribution.”

This language is a portion of the Commission's documented economic decision in *Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th Ed.), par. 25,291, holding under the McGuire Act that a manufacturer who was also a retailer could fair trade at the retail level. The Commission carefully reviewed the McGuire Act, its legislative history, and the relevant authorities, none of which sup-

¹ *Principles of Marketing*, Fifth Edition, 1952, pages 40, 41.

ports the appellee's position. It considered statistics demonstrating the universal practice of manufacturers to operate outlets of their own at all levels of distribution and also to distribute through independently owned outlets. It concluded that it would be contrary to Congressional intent, unsupported by authority, and unrealistic in the light of known marketing methods to give the McGuire Act the interpretation now being urged by the appellee.

As the Federal Trade Commission stated in the concluding paragraphs of its decision:

"The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.

"It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.

"Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress declared that the practice was not unlawful and not against the public interest."

This decision represents the unanimous determination (one Commissioner not participating) of the administrative agency charged by law with the duty of administering the Federal Trade Commission Act, including the McGuire

Act. It is entitled to great weight. See *United States v. Jackson*, 280 U. S. 183. It further demonstrates the correctness of the District Court's decision.

We respectfully submit, therefore, that the appellant presents no substantial question for review by this Court, and that the judgment of the District Court should be affirmed.

JOHN P. McGRATH,
20 Pine Street,
New York 5, N. Y.
Counsel for Appellee.

HODGES, REAVIS, McGRATH,
PANTALEONI & DOWNEY.

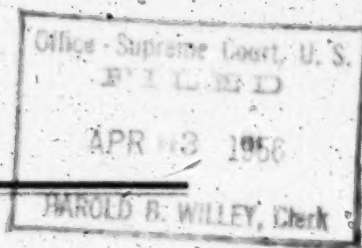
LAURENCE C. EHRHARDT,
MARLAND GALE,
ROBERT THRUN,
DENIS B. SULLIVAN,

Of Counsel.

November, 1955.

LIBRARY
SUPREME COURT: U.S.

No. 448.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA,

Appellant,

v.

McKESSON AND ROBBINS, INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR McKESSON AND ROBBINS,
INCORPORATED.**

JOHN P. McGRATH,

20 Pine Street,

New York 5, N. Y.

Counsel for Appellee.

HODGES, REAVIS, McGRATH, PANTALEONI
& DOWNEY.

LAURENCE C. EHRHARDT,

MARLAND GALE,

DENIS B. SULLIVAN,

ROBERT THRUN,

Of Counsel.

INDEX.

	PAGE
RESTATEMENT OF QUESTION.....	1
FURTHER STATEMENT AS TO STATUTES INVOLVED.....	1
STATEMENT	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT:	
I. The purpose of the legislation is to protect the good will of the manufacturer by permitting him to maintain resale prices on his competitive brand merchandise.	
This protection necessarily involves elimination of price competition among different outlets for the manufacturer's own branded merchandise	8
II. The legislative history of both the Miller-Tydings and McGuire Acts show that Congress intended to extend fair trade to integrated manufacturers, such as McKesson.....	11
Miller-Tydings Bill	11
(1) Committee Reports	11
(2) Representative McLaughlin's Statement	12
(3) Government's Acquiescence	13
McGuire Act	13
Senator Humphrey's Statements.....	13
III. The economic effects of fair trading are the same whether the manufacturer is integrated or non-integrated	17
IV. Most manufacturers also act as wholesalers or retailers	18
CONCLUSION	23

CITATIONS.

Cases:

	PAGE
<i>Eastman Kodak Company</i> , 3 C. C. H. Trade Reg. Rep. (10th Ed.), par. 23,291.....	19
<i>Eastman Kodak Company vs. Schwartz</i> , 133 N. Y. S. 2d 908	10
<i>Federal Power Commission v. Panhandle Eastern Pipe Line Co.</i> , 337 U. S. 498.....	13
<i>Federal Trade Commission v. Bunté Bros.</i> , 312 U. S. 349	13
<i>Old Dearborn Distributing Co. v. Seagram-Distillers Corp.</i> , 299 U. S. 183.....	7, 8, 9
<i>A. H. Phillips, Inc. v. Walling</i> , 324 U. S. 490	3
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U. S. 384	2, 10
○ <i>Shaughnessy v. Pedriero</i> , 349 U. S. 48.....	17
<i>United States v. Bausch & Lomb Optical Co.</i> , 321 U. S. 707	9
<i>United States v. Cerecedo</i> , 209 U. S. 337.....	23
<i>United States v. Jackson</i> , 289 U. S. 183.....	23
<i>United States v. Masonite Corp.</i> , 316 U. S. 265.....	10

Miscellaneous:

<i>Maynard and Beckman, Principles of Marketing</i> , Fifth Edition, 1952.....	3, 19
81 Congressional Record 3138.....	12
98 Congressional Record 8870.....	14
House Report 382, 75th Cong.....	11
Senate Report 2053, 74th Cong.....	11
Senate Report, 879, 75th Cong.....	11

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA,

Appellant,

v.

McKESSON AND ROBBINS, INCORPORATED,

Appellee.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK*

**BRIEF FOR McKESSON AND ROBBINS,
INCORPORATED.**

Restatement of Question Presented.

Are fair trade contracts between a manufacturer of competitive brand-named merchandise and independent wholesalers of that merchandise, otherwise concededly legal under the Miller-Tydings and McGuire Acts, rendered illegal when the manufacturer also functions as a wholesaler?

Further Statement as to Statutes Involved.

The Miller-Tydings Act (Act of August 17, 1937, 50 Stat. 693) added to the Sherman Act, 15 U. S. C. 1, two proviso clauses which authorized fair trade contracts

when consistent with state law. This statute on which the Government relies, has remained unchanged since 1937.¹

The McGuire Act (Act of July 14, 1952, 66 Stat. 632) amended 15 U. S. C. 45(a), and contained additional subparagraphs not cited by the Government.

Subparagraph (3) of the McGuire Act validates enforcement of fair trade resale prices against "non-signers", thus modifying the effect of the decision of this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

Subparagraph (4) of the McGuire Act reads as follows:

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce."

Statement.

The only products involved here are brand-named drug products which are manufactured by McKesson & Robbins, Incorporated ("McKesson"), and distributed in the sharply competitive market shared by many other brands of similar merchandise produced by others. McKesson has been a manufacturer for more than 100 years (R. 66) and has a separate manufacturing division, known as the McKesson Laboratories, at Bridgeport, Connecticut (R. 53). McKesson products are "fair-traded" in states where this is lawful.

¹ So far as we know, this is the first action in which the Government has asserted that fair trade protection is restricted to single function manufacturers who distribute only through independent, non-competing outlets, although most American manufacturers are also part wholesalers, part jobbers, part retailers, etc.

For the year ending June 30, 1952, the total gross sales by the Laboratories of McKesson brand products amounted to approximately \$11 million (R. 66). Of this total, sales of about \$8.3 million were made to the 74 independently operated wholesale divisions of McKesson. Direct sales of \$763,767 were made by the Laboratories to 23 other wholesalers. Of these 23 wholesalers, 10 are located in trading areas which overlap in whole or substantial part the trading areas of 7 McKesson wholesale divisions (R. 30, 37, 60-61). Sales by the Laboratories to these 10 wholesalers amounted to only \$283,462 (R. 30-31).¹

The balance of the Laboratory sales, about \$2 million, were made largely to chain stores and similar bulk purchasers, who, while retailers, in fact perform a portion of the storage and distributing functions of wholesalers² (R. 60, 201), as is shown by the letters from many of these direct purchasers (R. 202, 222, 232, 239, 243 and 246). In recognition of the additional function performed by these retail bulk purchasers, a 20% discount is given (R. 200). Such sales are traditionally made direct by the manufacturer, since the customer's storage and distribution facilities dispense with the need for the usual wholesaler. This type of sale is not competitive with sales by wholesalers, who usually sell in small amounts to individual retailers, the average order being \$45 (R. 155). The direct sales by the Laboratories reach an essentially different market.

The Laboratories bills all its wholesaler customers, including the 74 McKesson wholesale divisions, at the uniform published fair trade list prices less a discount of 25% (R. 200). Sales to retailers are made at the published

¹ There is some fringe competition in an unstipulated amount in 6 additional wholesale division areas (R. 61-63).

² See *A. H. Phillips, Inc. v. Walling*, 324 U. S. 490; Maynard and Beckman *Principles of Marketing*, 5th Edition, 1952, pp. 329-30.

fair trade list prices less smaller discounts ranging from 10% to 10% and 5% (i.e. 14.5%), except that on single shipments of \$1,000 or more, a 20% discount is allowed (R. 200).

The Laboratories has established uniform fair trade resale prices which apply to all wholesalers, including the wholesale divisions of McKesson, and to retailers, and has entered into fair trade contracts in connection with such resale prices. McKesson adopted a universal contract system after the *Schwegmann* decision, *supra*.

Resale prices by wholesalers to retailers range from 10% to 10% and 5% (i.e. 14.5%) less than list, depending on quantity (R. 200), except that on single shipments of \$1,000 or more, no resale price is now fixed¹ (R. 209).

The 74 wholesale divisions of McKesson operate independently of the Laboratories in function, organization and personnel (R. 65, 70-72). The relationship between the Laboratories and the wholesale divisions is essentially the same as between every other manufacturer and the divisions (R. 158-9). The preparation and enforcement of fair trade contracts is lodged exclusively in the Laboratories (R. 56), despite the appellant's contrary inference from McKesson's efforts after *Schwegmann* to obtain contracts from all wholesalers (brief, pp. 9 and 10).

Each wholesale division, which is in fact a local wholesaler in its own area (R. 6, 31, 36), functions as a warehouse of drug products of all manufacturers, and sells a complete drug line to local retailers, who want quick delivery, often daily deliveries, of small amounts (R. 155).

¹ As the average order received by wholesalers amounts to about \$45 (R. 155), it was formerly believed that wholesalers would not get single orders for as much as \$1,000 of McKesson products (R. 121). During preparation for trial, however, it was discovered that on "rare" occasions, some wholesalers did receive orders of this size (R. 69). McKesson's fair trade contracts were promptly revised to exclude from their coverage single sales of \$1,000 or more (R. 209).

From time to time, the McKesson wholesale divisions are requested by other wholesale houses in the same area who carry no stocks, or limited stocks, of McKesson brand merchandise to supply small amounts to enable those houses to fill orders. These "accommodation" sales are made as a matter of courtesy (R. 40, 55, 148-149). Their effect, of course, is to increase competition since the courtesy sales strengthen the competitive position of the other wholesalers. The total of such sales runs to about \$200,000, or an average of about \$1,600 yearly to each of the 127 outside houses to whom courtesy sales were made (Annex to Item 14, Answer to Supplemental Interrogatories). In contrast, the average sales of McKesson brand products made by the McKesson wholesale divisions amounted to approximately \$110,000 annually (R. 31).

The above statements account for all the sales of McKesson brand drug products which are the only sales involved in this action.

The other products which the McKesson wholesale divisions sell and the amount of such sales are not relevant, since McKesson does not establish the fair trade prices for such other products.

Summary of Argument.

The purpose of fair trade legislation is to permit a manufacturer of competitive brand merchandise to protect his good will by price maintenance contracts. This necessarily involves elimination of price competition between different outlets for the manufacturer's own brand merchandise. By amended legislation, price maintenance may also be enforced against "non-signers".

Congress, by a positive grant of authority, has affirmatively approved fair trade contracts in interstate commerce

when lawful under state law. This applies only to trademarked or brand merchandise. The legislation lays down its own definition of competition: the commodities must be sold competitively with other similar brand merchandise. It is undisputed that McKesson solely as a *manufacturer* has the right to fair trade its own competitive brand merchandise.

The Government bases its entire case on the statutory proviso which inhibits contractual price fixing between manufacturers, wholesalers, retailers or competitors. The Government's contention is that McKesson, which acts as a wholesaler and also sells direct to certain classes of retailers, is thereby forbidden as a *manufacturer* to make fair trade contracts for the protection of its good will and its own competitive brand products.

This interpretation gives no effect to the purpose of the legislation and violates the fundamental canon that all parts of a statute must be read together. When read as a whole, the statute is seen to validate manufacturers fair trade contracts when made vertically down the channels of distribution of the brand merchandise. The statute declares that resale price contracts are invalid only when they lie outside the normal downstream flow of the product from the source, i. e. the manufacturer, through the succeeding channels of distribution, such as contracts made between manufacturers of different products or contracts made between wholesalers of the same product not produced by any of them. In distinguishing between "vertical" and "horizontal" contracts, Congress intended to authorize vertical or downstream arrangements between a seller and a buyer on different levels of distribution.

The legislative history supports our position.

As was well known to Congress, the American genius for production and distribution is not confined to limited

or rigid relationships. Among many other ways, a manufacturer may sell through salesmen, wholesalers, direct mail, jobbers, exclusive distributors, or factors. Government statistics show that most manufacturers are also technically wholesalers or retailers.

For 15 years the Government made no effort to assert the claim it now makes here. The Federal Trade Commission, which is specifically charged with enforcement of the McGuire Act (subdivision 6), has rejected the same claim. The economic effect of fair trading is the same whether or not the manufacturer is integrated. What channels are used by a manufacturer who has fair traded his brand products to bring these products to the consuming public is a matter of individual choice and trade custom. The method of distribution has no relevance to the issue of violation since the manufacturer, McKesson, has not made any horizontal price fixing arrangements with any other manufacturer. On the contrary, pursuant to the statute it made at the source, as a manufacturer, valid downstream price fixing arrangements with its outlets. Since such pricing by McKesson became effective in each instance on the first transaction by which its products entered the stream of distribution, the vertical nature of the transactions cannot be disputed. Hence, there is no illegality.

It does not advance the solution of the issue to urge, as the Government does, that price fixing is illegal *per se* (brief, pp. 14-17, 25-28). What is involved here is resale price maintenance pursuant to fair trade legislation in protection of the good will attaching to brand products. This is *legal per se*, as this Court has held since *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936).

ARGUMENT.

I.

The purpose of the legislation is to protect the good will of the manufacturer by permitting him to maintain resale prices on his competitive brand merchandise.

This protection necessarily involves elimination of price competition among different outlets for the manufacturer's own branded merchandise.

Twenty years ago this Court sustained the constitutionality of state legislation which authorized resale price maintenance contracts. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936). In its opinion, at page 193, the Court stated the purpose to be achieved by such laws:

"The primary aim of the law is to protect the property—namely the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself."

The Court further explained, at page 194:

"We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the market or the good will that the market symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of com-

modities. And distinctive trademarks, labels and brands, are legitimate aids to the creation or enlargement of such good will."

The Miller-Tydings Act was enacted shortly after the *Old Dearborn* decision and affirmatively approved protection of good will and brand names in interstate commerce provided that such protection was valid under state law and that brand competition was preserved. The McGuire Act reaffirmed the earlier legislation and made it applicable also to "non-signers." The effect of this legislation does not depend on whether the manufacturer is integrated or non-integrated.

Even in *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, on which the appellant relies, this Court assumed the validity of fair trade contracts at the wholesale level where the manufacturer was a wholesaler whose wholesale outlets accounted for 60% of the sales made to retailers. While the fair trade contracts in that case were set aside because they "came into existence as a patch upon an illegal system of distribution" (p. 724), this Court made it clear in footnote 5 on page 724 that such a system of price maintenance contracts would otherwise be valid;

"We do not understand the opinion of the District Court to impugn the validity of bilateral contracts, identical in form between a producer or distributor, on the one hand, and their customers on the other, entered into under the Miller-Tydings Act."

The court accordingly approved a decree permitting the execution of new fair trade agreements between the same parties and on the same terms at the end of a six month period of suspension.

The ruling of this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951) was that the Miller-Tydings Act did not authorize enforcement of fair trade prices against "non-signers", a defect in the fair trade structure which was cured in 1952 by the McGuire Act. Congress thus evidenced a firm intention to support and legalize fair trade in interstate commerce when valid under state law.

United States v. Masonite Corp., 316 U. S. 265, relied upon by the appellant, did not involve fair trade contracts. They were principally horizontal agreements among competing manufacturers fixing the prices at which the products of one of them should be sold. Even if the agreements had been fair trade contracts, they would not have qualified as valid under the Miller-Tydings Act and McGuire Act.

See also *Eastman Kodak Company v. Schwartz* (not reported officially) 133 N. Y. S. 2d 908 (Sp. Ct. N. Y. Co. 1954), which held under the McGuire Act that a manufacturer may fair trade at the retail level even though the manufacturer operates competing retail outlets. See also the *Eastman Kodak* decision of the Federal Trade Commission, *infra*.

Thus the appellant's arguments and numerous citations of authority (brief, pp. 25-34), however valid they may be in other fields, have no relevance to the legislative area of fair trade.

Congress has provided protection for a manufacturer's good will by permitting price maintenance contracts and resale price enforcement even against "non-signers". Such protection eliminates price competition at every functional level, provided that, as is the fact in this case, brand versus brand competition exists.

The legislative history of both the Miller-Tydings and McGuire Acts shows that Congress intended to extend fair trade to integrated manufacturers, such as McKesson.

The legislative history of the federal fair trade statutes, including both Committee reports and the statements of legislators, confirms the interpretation that a manufacturer should not be denied fair trade protection of his own competitive brand products at the wholesale level simply because he also distributes such products through his own outlets.

Miller-Tydings Bill.

(1) Committee Reports.

From the earliest reports on the bills which eventually were enacted as the Miller-Tydings Act, it was apparent that the proponents of this legislation were interested in assuring brand versus brand competition and in preventing the extension of fair trade into general price fixing by groups of manufacturers, producers, wholesalers or retailers.¹

The State laws did not "authorize horizontal contracts, that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity."²

¹ See Senate Report 2053, 74th Cong.; House Report 382, 75th Cong.; Senate Report 879, 75th Cong. recommending the enactment of Title VIII of H. R. 7472 which finally became the Miller-Tydings Act.

² Senate Report 879, 75th Cong., p. 6.

The proviso in the Miller-Tydings Act, being the second proviso in the Sherman Act (15 U. S. C., Sec. 1), carried over the provision of the state laws, but added the words "brokers" and "factors" and the general catch-all phrase "persons, firms or corporations in competition with each other". This language embraced, for example, horizontal agreements between jobbers, between broker and factor, between wholesaler and jobber, between the jobber and the factor, and similar types of relationships. The Congressional history is silent with reference to this catch-all provision. There is every indication, however, that *any* legitimate manufacturer with a bona fide interest in the good will of his own brand products should be entitled to obtain price protection wherever brand versus brand competition existed.

(2) Representative McLaughlin's Statement.

Representative McLaughlin, a member of the House Judiciary Committee which considered a prior draft of the Miller-Tydings bill (H. R. 1611) also spoke on the bill, saying, 81st Cong. Rec. 3138, (1937):

"... As an example, the act would not allow two manufacturers of similar trade-marked articles, as, for instance, articles of food or drugs or clothing to soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—contracts known as horizontal contracts. The latter contracts, if violative of the

Sherman Act now, will still be violative of that act if H. R. 1611 becomes a law."

(3) Government's Acquiescence.

Thus, the Congressional history of the Miller-Tydings Act gives no support to the contention which the Attorney General advanced for the first time fifteen years later in 1952. On the contrary, such statements as appear in the record justify the inference that the Attorney General's long acceptance of fair trade by integrated manufacturers indicated his concurrence with the statements made to the House.

The failure of the Department for so many years to assert its present contention indicates doubt as to the validity of that position. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351.

McGuire Act.

Senator Humphrey's Statements.

On the floor of the Senate in 1952, Senator Humphrey, whom the Government characterizes as one of the leading proponents of the McGuire Act, made an extensive exposition of the difference between "vertical" and "horizontal" contracts in the fair trade field.

Senator Humphrey made it clear that fair trade was not to be denied to a manufacturer who was also a wholesaler or retailer, but that the test was whether the fair trade contract was made between a seller and a buyer.

In other words, Senator Humphrey said, a producer who is a wholesaler:

"* * * may still lawfully make contracts with other wholesalers and retailers, when in making such contracts, they act as producers of a trade-marked or

branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts * * *.

The forbidden type of an agreement between wholesalers, as Senator Humphrey explained it, was one by which two wholesalers attempt to fix prices for products which neither produces.

Senator Humphrey's exposition occurred in a colloquy with Senator Sparkman in 98 Cong. Rec. 8870 (1952) which is set forth below (*italics ours*):

"Mr. Sparkman. Mr. President, I should like to ask the Senator from Minnesota one or two questions in order to be absolutely clear in my own mind, and in order that the Record may be absolutely clear. I propound these questions to the Senator from Minnesota, because I know of the great interest he has in this proposed legislation, the work he has done on it, and his understanding of the facts and the background. Therefore, I should like to ask his opinion on these two questions.

"Mr. Humphrey. I shall be glad to answer the Senator's questions if I can.

"Mr. Sparkman. I have always been much concerned about horizontal resale price maintenance agreements which have been considered illegal. Do I correctly understand that this bill does not make that type of agreement lawful?

"Mr. Humphrey. The Senator from Alabama is absolutely correct. This bill does not make lawful the type of agreement to which he refers. It is entirely clear from paragraph (5) of section 5 (a) of the Federal Trade Commission Act, as amended by this bill, that horizontal resale price-maintenance agreements such as between a wholesaler and a wholesaler, or between a retailer and a retailer, or a manufacturer and a manufacturer, are not made lawful. They are illegal and subject to prosecution.

It is only vertical resale price-maintenance agreements which are exempt from the antitrust laws when they meet the requirements of paragraph (2).

"Mr. Sparkman. It would dispel any misunderstanding concerning lawful vertical resale price-maintenance agreements and unlawful horizontal resale price-maintenance agreements if the Senator from Minnesota would explain further for the Record the differences between the types of agreements.

"Mr. Humphrey. I talked with the Senator about this matter, and I want to be very accurate. I have gone into it very carefully. Under this bill, a lawful vertical price-maintenance agreement is one entered into by the producer of a trade-marked or branded commodity, and the immediate or subsequent resellers of such commodity in the chain of distribution from producer to ultimate consumer, whereby the minimum resale price at either the wholesale or retail level, or both, is prescribed. If, for example, when a producer, who sells to distributors, wholesalers, retailers and consumers, makes a resale price-maintenance agreement relative to a commodity made by him and bearing a trade-mark or brand, with a distributor, wholesaler, or retailer who resells such commodity at either the wholesale, or retail level there exists a vertical resale price-maintenance contract which would be lawful under the bill if the requirements of paragraph (2) are met.

"On the other hand, if one wholesaler enters into a resale price-maintenance agreement with another wholesaler prescribing the price at which they both sell a trade-marked or branded commodity which they both buy from the producer, that agreement would be horizontal and would not be made lawful.

"In other words, wholesalers getting together on a price are acting illegally. For a manufacturer to get together with other manufacturers to maintain prices is illegal, but for a manufacturer to say that

a certain product will sell at a certain price from the manufacturer down to the retailer is legal under the limitations prescribed in paragraph (2) of section 5 (a) of the Federal Trade Commission Act.

"In general, the test of whether, a resale price-maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price-maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. *While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.*

"This question has been discussed in many colloquies on the floor, and I am happy to have it formalized by interrogation. But it should be clearly noted that price fixing between producers, price fixing between wholesalers, and price fixing between retailers is unlawful and should be prosecuted.

"Mr. Sparkman. And the bill does not propose anything which would change that illegality.

"Mr. Humphrey. That is correct. My admonition to the Federal Trade Commission and to the Justice Department is to keep a careful weather eye

open on the kind of horizontal price-maintenance agreements which are entered into, because those which are illegal should be prosecuted."

The fact is that the vote on the bill followed shortly after the colloquy between Senators Humphrey and Sparkman, and 64 senators voted for the McGuire bill and 16 against, without any expression of dissent from Senator Humphrey's remarks (98 Cong. Rec. 8891, 1952).

Indeed, there is not one sentence in the entire legislative history which conflicts with the interpretation given by Senator Humphrey. Cf. *Shaughnessy v. Pedriero*, 349 U. S. 48, 52.

III.

The economic effects of fair trading are the same whether the manufacturer is integrated or non-integrated.

So long as there is brand versus brand competition of similar products, it is immaterial whether the manufacturer also participates in the distribution process as a wholesaler or retailer.

The contrary doctrinaire arguments of the appellant (at, among other places, pages 17, 19 and 42-45 of its brief) are unsupported in the record and without substance. It is said (brief, p. 19) that:

"If a manufacturer's own wholesale outlets are inefficient, he may seek to meet the problem by setting his 'fair trade' price higher than otherwise".

The same argument is repeated at page 44:

"But an 'integrated' manufacturer is likely to fix resale prices primarily in relation to its own outlets,

and if these are inefficient the price thus fixed will tend to be higher than if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431."

These and similar arguments completely ignore the purpose of the statute, as well as realities of economic life. McKesson, as an integrated manufacturer selling its own tooth paste and sun tan lotion, while free to fix its own prices, must sell the products in competition with the many other brands of tooth pastes and lotions. No manufacturer, integrated or not, can afford to fix an arbitrary high price for his competitive product. If he did, he would price himself out of the market.

As Mr. Brandeis (later Mr. Justice Brandeis) said in discussing trade mark protection:

"The independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition." ("Cutthroat Prices", Harper's Weekly for November 15, 1913, Vol. 58, pp. 10, 12).

IV.

Most manufacturers also act as wholesalers or retailers.

In the complex and fluid American economy few manufacturers adopt rigid methods of distributing their products and few indeed exclude themselves entirely from the distribution process as wholesalers or retailers.

The Federal Trade Commission, which is charged by law with administering the McGuire Act, recently held

under that act that a manufacturer who was also a retailer could fair trade at the retail level (*Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th Ed.), par. 25,291). It found that for "sound business or economic reasons"—

" . . . the practice of selling exclusively through 'regular channels' of distribution is almost becoming the exception rather than the rule."

A study of the Censuses of Business by Professors Maynard and Beckman of Ohio State University¹ reveals that 22% of all manufactured goods are wholesaled through outlets owned or operated by manufacturers, as compared with only 25% through independent wholesalers. The other 53% represents direct sales by manufacturers to industrial and other large users, to retailers, both manufacturer operated and independently owned, to consumers and to others than wholesalers.

The certified results of a survey made by the American Fair Trade Council of known fair trading manufacturers (R. 12, 15) reveals that 86% of all such manufacturers who responded to inquiries made of them sold "fair traded" products to wholesalers. Of this 86% who sold to wholesalers, 82% also sold to retailers, 34% also sold to consumers, 10% also have wholly-owned or controlled subsidiaries that sell to wholesalers, 9% also have wholly-owned or controlled subsidiaries that sell to retailers and 4% also have wholly-owned or controlled subsidiaries that sell to consumers.

Further evidence of business integration is found in 1948 U. S. Census of Business:

Bulletin No. 3-4 "The Electrical Goods Trade"—reports (p. 18) that in 1948 there were 1,326 "Sales branches and offices of electrical goods manufac-

¹*Principles of Marketing*, Fifth Edition, 1952, pp. 40, 41.

turers" defined (p. 9) as including "establishments maintained apart from manufacturing plants by manufacturing companies primarily for selling or marketing their products at wholesale. Sales branches or offices located at manufacturing plants or at administrative offices of manufacturers are excluded unless operated as separate and distinct businesses." The gross sales of such establishments for one year was reported (p. 18) as totaling \$4,374,478,000.

Bulletin No. 3-13 "The Hardware, Plumbing and Heating Equipment Trade"—reports (p. 3) that there were 178 "Hardware manufacturers, sales branches and offices combined" and 890 "Plumbing, heating goods manufacturers, sales branches and offices combined" defined (p. VIII) as including "establishments maintained apart from manufacturing plants by manufacturing companies primarily for selling or marketing their products at wholesale. Sales branches or offices located at manufacturing plants or at administrative offices of manufacturers are excluded unless operated as separate and distinct businesses." The gross sales of such establishments for one year was reported (p. 3) as totaling \$1,201,749,000.

Bulletin No. 3-6 "The Drug Trade"—reports (p. 2) that in 1948 there were 327 "sales branches and offices of drug, proprietaries, toiletries manufacturers" defined (p. VIII) as "Establishments maintained apart from processing plants by manufacturers primarily for selling or marketing their products at wholesale. Sales branches or offices located at processing plants or at general administrative offices of processors are excluded unless operated as separate and distinct businesses." The gross sales of such establishments for one year was reported (p. 2) as totaling \$692,500,000.

In the *Eastman Kodak* case, *supra*, the Federal Trade Commission carefully reviewed the McGuire Act, its legislative history, and the relevant authorities, none of which supports the appellant's position. The Commission considered statistics demonstrating the universal practice of manufacturers to operate outlets of their own at all levels of distribution and also to distribute through independently owned outlets. It concluded that it would be contrary to Congressional intent, unsupported by authority, and unrealistic in the light of known marketing methods to give the McGuire Act the interpretation now being urged by the appellant.

In rejecting the Government's contentions, the Commission stated:

"The merchandising practices of respondent are in no sense unique. We can take judicial notice of the fact that many manufacturers are partially integrated and engage to a lesser or greater degree in some form of wholesaling or retailing activity. In fact the volume of direct selling in this country has reached tremendous proportions. This is so of manufacturers who 'fair trade' as well as with others. As a matter of fact the practice of selling exclusively through the 'regular channels' of distribution is almost becoming the exception rather than the rule. Sound business or economic reasons may justify such methods of distribution.

"This common business practice was well known and generally accepted at the time of the enactments of the Miller-Tydings and McGuire Acts. In determining Congressional intent there is a strong presumption that Congress does not act in a vacuum and is fully informed as to contemporaneous conditions of common knowledge.

"If resale price maintenance and partial integration are to be permitted when existing separately, the question is pertinent as to whether the combi-

nation of the two practices is detrimental to our economy. The present litigation which seeks to divorce them is supposed to be 'in the public interest' but counsel in support of the complaint give no hint of an economic basis for the action. It is true, of course, that as a result of respondent's fair trade agreements there is a uniformity of retail prices. But this would continue to exist even if respondent were ordered to divest itself of the 35 stores.

"An interesting discussion of several economic theories which might be broached for precluding the combination is contained in Prof. Weston's article on resale price maintenance. He suggests that it is unlikely that the combination either stimulates further integration, or tends to injure independent dealer competition. On the contrary there is respectable authority, he says, to the effect that resale price maintenance laws eliminate one of the strong incentives for integration and tend to increase the number of independent retailers and wholesalers.

"The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.

"It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.

"Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress

declared that the practice was not unlawful and not against the public interest."

The decision was reached after a full hearing on the facts ordered by the Commission following earlier consideration by it of the issues involved. It represents the unanimous determination (one Commissioner not participating) of the administrative agency charged with the duty of administering the McGuire Act, as specifically provided in subdivision (6). For this reason, as well as the soundness of the views expressed, the Commission's ruling is entitled to great weight. *United States v. Cerecedo*, 209 U. S. 337; *United States v. Jackson*, 280 U. S. 183.

As the Commission said, the interpretation of the statutes now being urged by the appellant would soon result in the grant of the power to "fair trade" being substantially swallowed up by the exceptions, and would completely frustrate the intent of Congress.

Conclusion.

We respectfully submit that the judgment of the District Court should be affirmed.

JOHN P. McGRATH,
20 Pine Street,
New York 5, N. Y.
Counsel for Appellee.

HODGES, REAVIS, McGRATH,
PANTALEONI & DOWNEY.

LAURENCE C. EHRHARDT,
MARLAND GALE,
DENIS B. SULLIVAN,
ROBERT THRUN,
Of Counsel.

April, 1956.